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Jan 24 1994		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Feb 8 1994		Brief of respondent Gary Dixon, Warden and appendix in opposition filed.
Feb 10 1994		DISTRIBUTED. February 25, 1994
Feb 25 1994		Reply brief of petitioner David Lawson filed.
Feb 28 1994		Petition DENIED. Dissenting opinion by Justice Blackmun. (Detached opinion.)
		**********
Mar 3 1994		Petition for rehearing filed.
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EDITOR'S NOTE

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No. 93-7657

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID LAWSON,

Petitioner,

-v.-

GARY DIXON, Warden,
Central Prison,
Raleigh, North Carolina

Respondent.

Supreme Court, U.S.
FILED
JAN 24 1994
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, David Lawson, a state prisoner under sentence of death, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on August 26, 1993 denying his appeal from the denial of a petition for writ of habeas corpus in the United States District Court for the Middle District of North Carolina; rehearing was denied by the Court of Appeals on October 26, 1993.

QUESTIONS PRESENTED

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

2. **Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?**

3a. **Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?**

3b. **If So, Must Such A Waiver Be Knowing And Intelligent?**

3c. **Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

4a. **Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?**

4b. **Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

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No. 93-___

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DAVID LAWSON,

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GARY DIXON, Warden,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals is published at 3 F.3d 743 (4th Cir. 1993) and is reproduced in Appendix "A" of this petition.

JURISDICTION

Rehearing from the judgment of the United States Court of Appeals for the Fourth Circuit was denied on October 26, 1993. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

At issue in this case is the Sixth Amendment to the United States Constitution, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. Also at issue in this case is the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII. Additionally, the Fourteenth Amendment to the United States Constitution is implicated, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

Statutory provisions are also implicated in this case, including 21 U.S.C. § 848(q)(4)(B), which states, in pertinent part,

> In any post-conviction proceeding under §2254 with issues relating to guilt or sentence, any defendant who is or becomes financially unable to obtain . . . investigative, expert, or other reasonably necessary services shall be entitled to the . . . furnishing of such . . . services.

Also implicated is 21 U.S.C. § 848(q)(9), which provides:

> Upon a finding in *ex parte* proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services . . . .

Finally, 28 U.S.C. § 2254 is also implicated, and it provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . .

28 U.S.C. § 2254.

STATEMENT OF THE CASE

In March, 1981, the Cabarrus County grand jury returned true bills of indictment on Lawson for first degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. Lawson was tried on pleas of not guilty at the June, 1981 session of Cabarrus County Superior Court. He was represented at trial by James C. Johnson and Frank Plummer, and was convicted of all charges. On June 6, 1981, following a binding jury recommendation that the sentence be death, the trial court imposed the death sentence.

The Supreme Court of North Carolina affirmed his convictions and death sentence on May 21, 1984. *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984). Lawson subsequently petitioned this Court for certiorari, which was denied on May 20, 1985. *Lawson v. North Carolina*, 471 U.S. 1120 (1985).

Thereafter, on February 11, 1986, Lawson filed a Motion for Appropriate Relief in the Superior Court of Cabarrus County, the standard post-conviction collateral relief pleading under North Carolina law. Lawson twice amended his Motion for Appropriate Relief prior to the conduct of an evidentiary hearing. On May 26, 1987, an evidentiary hearing was held in the Superior Court of Cabarrus County, and on July 1, 1987, the Motion

for Appropriate Relief, as amended, was denied. Lawson sought certiorari from the North Carolina Supreme Court and this Court; each was denied, on April 6, 1988 and April 20, 1988, respectively.

On April 14, 1988, petitioner filed an application for a stay of execution with the United States District Court for the Middle District of North Carolina. A stay order was entered and thereafter post-conviction counsel, Mr. Harry H. Harkins, Jr. of Durham, North Carolina, sought the assistance of the North Carolina Resource Center in preparing and litigating a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The Resource Center filed a motion with the District Court for an extension of time within which to file the petition for writ of habeas corpus, and this motion was granted.

On July 12, 1988, Lawson filed a petition for writ of habeas corpus in the District Court. Lawson acknowledged that many of the claims raised in the petition had not previously been presented to the state courts, and contemporaneously filed a second Motion for Appropriate Relief in the Superior Court of Cabarrus County, raising those claims of federal constitutional dimension which were included in the federal habeas petition but which had not previously been presented to the state courts. Lawson moved the District Court to hold the federal petition in abeyance pending the outcome of the second Motion for Appropriate Relief; the State objected to this motion. On August 18, 1988, the United States Magistrate Judge recommended that the motion to hold the federal proceedings in abeyance be denied, that the petition be dismissed as a "mixed" petition under *Rose v. Lundy*, 455 U.S. 509 (1982), and that the stay of execution entered by the District Court be dissolved effective thirty days following the dismissal. Both parties timely filed objections

to the Findings and Recommendations of the United States Magistrate Judge. Nevertheless, on September 2, 1988, the District Court followed the Magistrate Judge's Findings and Recommendations.

The State filed a motion to alter or amend judgment and for relief from judgment, pursuant to Rules 59(e), 60(b), Fed. R. Civ. P. on September 9, 1988. In its motion, the State suggested that it would waive the exhaustion requirement. Thereafter, on September 14, 1988, the District Court telephonically sought a clarification from the State as to whether its waiver of exhaustion was unconditional. On September 14, 1988, the State filed a Clarification of its Motion to Alter or Amend Judgment in which it unconditionally waived exhaustion of the claims of federal constitutional dimension which Lawson had not previously presented to the state courts. Following this clarification, the District Court, on September 21, 1988, noting that the State unconditionally waived exhaustion of state remedies, granted the State's motion to alter or amend judgment, vacated its judgment of September 2, 1988 insofar as it dismissed the habeas petition, and ordered the State of North Carolina to answer Lawson's habeas petition within 40 days. Two days later, on September 23, 1988, Lawson filed notice withdrawing his Motion for Appropriate Relief in the Superior Court of Cabarrus County, premised on the State's waiver of exhaustion and the District Court's vacation of its September 2, 1988 order dismissing the habeas petition for failure to exhaust State remedies.

Subsequent to the filing of the State's Answer and Motion to Dismiss, Lawson filed, *ex parte*, a motion for funds for the appointment of an expert psychiatrist. Attached to this motion was an affidavit of Billy Royal, M.D. who had conducted a preliminary evaluation

of Lawson. Dr. Royal had reviewed Lawson's mental health records from a brief hospitalization for a competency evaluation at Dorothea Dix Hospital, a state mental hospital, prior to Lawson's trial. On April 4, 1989, a hearing was held, ostensibly as a status hearing to determine the further progress of the litigation on the petition. At the hearing, the United States Magistrate Judge provided the State with a copy of Lawson's motion and Dr. Royal's affidavit. The State moved to dismiss, arguing that the proffer of expert testimony to support Lawson's several claims related to his mental health contained in the habeas corpus petition so altered the petition as to present new claims. The State asserted the defense of non-exhaustion of available state remedies. The United States Magistrate Judge required Lawson to brief and identify those issues on which he sought an evidentiary hearing.

Shortly thereafter, Lawson sought a stay of the federal proceedings in order to return to the state courts to re-exhaust his claim that the penalty phase instructions would have been understood by the jury to require unanimity before finding any mitigating circumstances, in light of the decision of this Court in *McKoy v. North Carolina*, 494 U.S. 433 (1990). A stay of the proceedings was granted. Following the denial to Lawson of relief in the state courts, the federal litigation on the petition was re-activated. The State moved to amend its answer to include the defense of non-retroactivity, and the amendment was allowed. Thereafter, further briefing on procedural defenses was ordered by the District Court. The District Court also expanded the record to include the complete files on Lawson from Dorothea Dix Hospital, and on November 19, 1991, the United States Magistrate

Judge issued an Order and Recommendation denying the motion for appointment of an expert psychiatrist, denying an evidentiary hearing, and dismissing the petition.

Both parties filed objections to the Order and Recommendations, and on January 7, 1992, the District Court entered judgment dismissing the petition. Lawson moved to alter or amend judgment on January 23, 1992, and on February 26, 1992 the District Court denied the motion. On March 19, 1992, Lawson filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), based on the United States Court of Appeals decision in *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992). Notice of appeal was filed on March 27, 1992, and after the District Court denied the motion for relief from judgment on March 31, 1992, another notice of appeal was filed on April 7, 1992. The two appeals were consolidated for briefing and argument.

On July 20, 1992, Lawson filed his brief in the United States Court of Appeals for the Fourth Circuit; on August 24, 1992, the State filed its brief in response. The case was argued orally in the Court of Appeals on December 3, 1992, and on August 26, 1993 the Court of Appeals decided the case. Rehearing was denied on October 26, 1993.

STATEMENT OF THE FACTS

On December 4, 1980, Wayne Shinn was murdered during a break-in of his home. His father, Buren Shinn, was also shot; the elder Shinn survived without serious permanent physical injury. David Lawson was arrested for the offenses on December 31, 1980, and was subsequently indicted on charges of first degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. At trial, the key State's witnesses were Buren Shinn, who identified Lawson as his assailant and described the murder of his son and the assault on himself, and Phyllis Soden, who shared a residence with Lawson and who testified to numerous inculpatory statements Lawson made to her regarding the offense. The defense put on no evidence, and the jury returned guilty verdicts on all charges. At the penalty phase of the case, the State presented no additional evidence. The only defense witness was Lawson himself. Lawson testified that his only prior convictions were two breaking and entering charges. Lawson also testified that he had previously provided truthful testimony in the prosecution of another felony, establishing a statutory mitigating circumstance. Finally, Lawson requested that the jury give him the death penalty, as life imprisonment is cruel and inhumane.

The jury found two statutory aggravating circumstances, at least one mitigating circumstance and, concluding that the aggravating factors outweighed the mitigating factors and that the aggravators were sufficiently substantial to call for imposition of the death penalty, recommended that David Lawson be sentenced to death.

During state post-conviction proceedings, Lawson alleged that trial and appellate counsel were ineffective for a variety of reasons, but did not allege ineffective assistance for

failing to investigate or develop mental health evidence in mitigation. *See Lawson v. Dixon*, 3 F.3d 743, 747, n.1 and accompanying text. In response to the allegations of ineffective assistance, trial and appellate counsel, James C. Johnson, provided the Superior Court of Cabarrus County with an audiotape, played during the evidentiary hearing in state post-conviction proceedings, of a lengthy conversation he had with Lawson during which, *inter alia*, Lawson explained his reasons for wishing to receive the death penalty rather than a sentence of life imprisonment if convicted of first degree murder.

In the federal habeas corpus petition, Lawson alleged several claims relating to mental health, including that Lawson's trial counsel had not provided effective representation by failing to investigate and develop available mental health evidence in mitigation, that Lawson was not competent to proceed to sentencing, that Lawson was not competent to waive known constitutional rights, and that Lawson did not knowingly and intelligently waive known constitutional rights. In its Answer, the State conceded that these claims had never been presented to the state courts but, as noted above, the State unconditionally waived the exhaustion requirement for federal review. Answer to Petition for Writ of Habeas Corpus, *Lawson v. Dixon*, No. C-88-738-S (filed M.D.N.C. October 31, 1988) at 3-5.

Subsequent to the State filing its answer to the petition, Lawson filed, pursuant to 21 U.S.C. §848(q)(4)(B), a motion for funds with which to retain an expert mental health professional for purposes of proving the mental health claims contained in the federal petition. Lawson was and remains indigent and was litigating his §2254 proceeding *in forma pauperis*. In support of his motion, Lawson appended the affidavit of a psychiatrist, Dr. Billy Royal, who had conducted a preliminary evaluation of Lawson, reviewed the records of

Lawson's hospitalization at Dorothea Dix Hospital (a state mental hospital to which Lawson had been briefly referred as an in-patient for a competency evaluation prior to his trial), and made preliminary findings that supported Lawson's claims in the petition and that warranted further evaluation for the presence of mental health mitigators which would have been present at the time of the trial.

At a status conference held on April 4, 1989, the United States Magistrate Judge to whom the case had been assigned by the District Court provided the State with a copy of Lawson's motion and the affidavit of Dr. Royal in support thereof. The stated purpose of providing these materials to the State was to give the State an opportunity to respond to what it might argue was a "new claim" not presented in the habeas petition, since the habeas petition alleged facts supporting claims of constitutional error relating to Lawson's mental health, but did not allege that a mental health professional would support the allegations. As expected, the State asserted that the use of mental health testimony would render the claims related to Lawson's mental health as alleged in the habeas petition so different as to present new claims to which the exhaustion requirement had not been waived and which had not previously been presented to the state courts; therefore, the State moved to dismiss the entire petition as "mixed" under *Rose v. Lundy*.

Thereafter, the United States Magistrate Judge expanded the record to include Lawson's entire records file from his brief hospitalization at Dorothea Dix Hospital. The ultimate diagnosis of the Dix Hospital psychiatrist was that Lawson was competent to proceed to trial, but the records noted a number of serious mental health problems. First, the pre-trial order of the Superior Court of Cabarrus County authorizing the

competency evaluation, which was contained in the Dix Hospital file, made findings of fact to support Lawson's transfer to the hospital. Among those findings of fact were that Lawson's original trial counsel who sought the evaluation "found the Defendant to be in such a mental state that the Defendant cannot adequately assist defense counsel with the preparation of the Defendant's defense." The Superior Court further found that petitioner exhibited an "inability to communicate with his attorney, depression, lapse of memory, anxiety, and a general lack of ability to understand the nature and seriousness of the charges against him." Also, the Dix Hospital records documented that "the client complained of having been depressed all his life," of having recent thoughts of suicide, of having attempted suicide five years earlier, of having trouble with his nerves, and of having received medication and treatment from a mental health center as a child. They also noted that Lawson "thinks that someone is talking to him," and the psychiatrist who gave the ultimate diagnosis that Lawson was competent to proceed to trial, Dr. Groce, noted that there was a suggestion of

> significant psychopathology including a low self-esteem with feelings of inferiority, insecurity and inadequacy. Mr. Lawson's MMPI profile suggest (sic) anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by a tendency to be self-dramatic. He may be expected to be chronically hostile and resentful and to use projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient. Expression of hostility and depression often form a cyclic pattern.

As is readily apparent, there was an abundance of evidence from the records of Dorothea Dix Hospital available prior to and at the time of trial suggesting that David Lawson had a history of mental health problems that could have been investigated and developed for use

at either the guilt or penalty phase of Lawson's trial, and this evidence was a part of the record considered by the federal habeas court.

In addition, the federal habeas court had for its consideration the affidavit of Dr. Billy Royal provided by the petitioner in support of his motion for funds. In Dr. Royal's affidavit, he opines that

> David [Lawson] has a very poor self-image and low self esteem which results in self-destructive behavior. The history indicates that this is a chronic behavior pattern, and results from being reared during his early formative years in a family of disturbed and chaotic relationships. Rejection and disappointment in efforts to develop close familial relationships are noted. Mr. Lawson's natural parents separated when he was approximately two years old. A major basis for this was the alcohol abuse and gambling addiction of his father. He lived with his maternal grandparents for about two years and then rejoined his mother at about age four when she remarried. The stepfather also abused alcohol. A stormy marital relationship was evident and a poor and hostile parent/child relationship was experienced. Early childhood memories are predominantly traumatic as well as anxiety- and depression-provoking. Behavioral problems developed as a child and after a period of time in a children's correctional center Mr. Lawson was not welcome back in the home. He has been independent since age fifteen. Attempts to return home or to develop a positive relationship were not accepted by his mother and stepfather. They have now been divorced for several years. Following a short stint in the Marine Corps, Mr. Lawson came to North Carolina to seek out his natural father. A marginal but basically unsatisfying relationship developed. His father had continued his habits of alcohol abuse and gambling obsessions.
>
> Mr. Lawson developed relationships of a limited intensity with both men and women. Fear of closeness, fear of rejection, as well as actual rejection with women was evident, even after a period of closeness. This appeared to follow a pattern similar to the rejection by his mother and resulted in Mr. Lawson developing casual or superficial relationships only. The fathering of a daughter by a relationship with a woman friend was recounted to me both with depression and ambivalence. A

> suicide attempt was made after that relationship terminated. Although platonic relationships with married persons developed, relationships of a mature male/female type were avoided, due primarily to Mr. Lawson's fear of rejection. A macho view of the world developed which in part included the process that you saw life in terms of "white" and "black" and you made definitive decisions as if you were totally in charge. Emotions were subrogated and denied as possible for himself as well as for others. This mental stance made it difficult if not impossible to view the world and options within it in a rational and objective manner as more normal people are able to do. This underlying and overt pathology was related not only to the acts that brought him to trial, but was predominantly involved in his failure to control his behavior and decisions in the trial process; there was a lack of capacity to understand his options in the trial and more particularly in the sentencing phase.
>
> Because of this conflictual underlying and overt pathology, I believe David Lawson was incapable of making voluntary, knowing and intelligent waivers of his rights at the sentencing hearing even if he had been given the factual evidence available and his potential options had been adequately explained to him. I believe that his mental state was such that he could not have incorporated that information and understood it on a rational and objective basis. In my opinion, the internal pathology, including the self-destructive behaviors, the macho image and tendencies, the depression with the emotional turmoil at the time resulted in Mr. Lawson making rather bizarre decisions at the time of the penalty phase.

Affidavit of Dr. Billy Royal, at pp. 4-5.

Finally, one other piece of evidence was before the District Court which shed light on Lawson's mental status – the affidavit of David's mother, Mavis Lawson. In response to the State's motion for summary judgment, Lawson submitted a number of materials, pursuant to Fed. R. Civ. P. 56(e). Among the materials submitted was an affidavit from Mavis Lawson, David's mother. In her affidavit, Mrs. Lawson confirmed much of the personal history David had earlier reported to the Dorothea Dix Hospital personnel and to

Dr. Royal, including that David's parents were separated when David was two years old, that David was left with his maternal grandparents after his parents separated, that David had a difficult adjustment to the separation from his mother ("I remember my mother telling me how for weeks David would sit by the window and stare out looking for me, . . . "), that David returned to live with his mother after she remarried, but that David's stepfather never accepted him and was verbally and psychologically abusive to David. Her affidavit confirmed that David's stepfather had a drinking problem, and would often come home drunk and become abusive.

The United States Magistrate Judge ultimately concluded that Lawson was not entitled to the funds for the appointment of a mental health expert nor to an evidentiary hearing on any of the claims in the petition; therefore, the United States Magistrate Judge recommended summary dismissal of the petition. The United States District Court adopted the Magistrate Judge's Order and Recommendation, including the findings of fact and conclusions of law. Importantly, one of the findings made by the United States Magistrate Judge was that, while the presentation of the affidavit of Dr. Royal modified the claim as presented in the petition so as to render it "new," the State would not be allowed to assert the defense of non-exhaustion of state remedies for four reasons. First, the State had already unconditionally waived the exhaustion requirement; second, the State limited its assertion of the defense to only one of the claims for which Lawson sought to employ expert testimony rather than to all of the claims upon which Lawson sought an evidentiary hearing (amounting, according to the Magistrate Judge, to a "conditional" waiver of exhaustion); third, the State's earlier waiver of exhaustion had prompted Lawson to withdraw his state

post-conviction pleading upon which he would have exhausted the claim at issue; and, fourth, the State would not be unfairly prejudiced and denial of the State's motion "better serves the ends of justice." *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991), Order and Recommendation of the United States Magistrate Judge, at 19.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

The Court of Appeals never explicitly discussed petitioner's claims of ineffective assistance of counsel in its opinion. It affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993). It appears that this includes petitioner's claim of ineffective assistance of trial counsel for failure to investigate and develop available mental health evidence in mitigation of the death sentence. To the extent that it does not, the Court of Appeals must have silently affirmed the federal district court's decision. The Magistrate Judge's Order and Recommendation concluded that insofar as Lawson was competent, trial counsel was under no duty to investigate any mental health evidence not rising to the level of incompetence since his client requested the death sentence. Order and Recommendation at 50 ("Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes."), *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

2. **Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?**

The Court of Appeals held "that such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993) (citations omitted).

3a. **Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?**

b. **If So, Must Such A Waiver Be Knowing And Intelligent?**

The Court of Appeals affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993). It appears that this includes petitioner's claim that his request to the jury for the death sentence amounted to a waiver of his Sixth and Eighth Amendment rights. To the extent that the Court of Appeals silently affirmed the district court, the Order and Recommendation of the United States Magistrate Judge primarily concluded that petitioner could only challenge his waivers if he were incompetent and, having decided that petitioner did not establish a challenge to his competence, he could not challenge the nature of any supposed waiver. Objections and Recommendation of the United States Magistrate Judge, at pp. 55-57, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991). Secondarily, the Magistrate Judge denied relief based on a tape recorded conversation between petitioner and trial counsel made by trial counsel prior to trial and played as evidence adduced at the state post-conviction hearing at which petitioner explained why he sought the death penalty. Objections and Recommendation of the United

States Magistrate Judge at 58, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

3c. **Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

The Court of Appeals held that petitioner "failed to present clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to his mental capacity. Accordingly, we affirm the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993).

4a. **Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?**

4b. **Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?**

In its opinion, the Court of Appeals never explicitly discusses petitioner's claims of ineffective assistance of counsel during the penalty phase for failing to investigate, prepare, or present evidence in mitigation, including mental health mitigation. It affirmed "the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition." *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993).

It appears that this includes petitioner's claim of ineffective assistance of trial counsel for failure to investigate and develop available mental health evidence in mitigation of the death sentence. To the extent that it does not, the Court of Appeals must have silently affirmed the federal district court's decision. The Magistrate Judge's Order and Recommendation concluded that insofar as Lawson was competent, trial counsel was under no duty to investigate any mental health evidence not rising to the level of incompetence since his client requested the death sentence. Order and Recommendation at 50 ("Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes."), *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991).

REASONS FOR GRANTING THE WRIT

1. **Whether A Trial Attorney Is Relieved Of The Duty To Investigate And Develop Available Mental Health Evidence In Mitigation Of The Death Sentence, To-Wit, A Pre-Trial Competency Evaluation Suggesting Serious Mental Health Problems Short Of Incompetence, When His Client Informs Him That He Prefers The Death Sentence Rather Than A Sentence Of Life Imprisonment If The Jury Returns A Guilty Verdict For First Degree Murder?**

David Lawson has never had an evidentiary hearing in support on his claim of ineffective assistance of counsel at the penalty phase of his capital trial for counsel's failure to investigate, prepare and present available mental health evidence. The claim was not raised in state court, but the State waived the defense of non-exhaustion of state remedies. *Lawson*, 3 F.3d at 748. The District Court found that a North Carolina statute allowing a state post-conviction judge to ignore a defendant's waiver for failing to earlier litigate a

claim when in a position to do so "preclude[d] enforcement of the North Carolina procedural bar unless a state court has actually enforced it as to a particular claim." Order and Recommendation of the United States Magistrate Judge, at 24, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. November 19, 1991). Nevertheless, Lawson was never accorded an evidentiary hearing in federal court on this claim.

In affirming the United States District Court for the Middle District of North Carolina, the Court of Appeals for the Fourth Circuit accepted the District Court's conclusion that a defendant who informs his counsel that he prefers the death sentence to the sentence of life imprisonment if convicted of first degree murder relieves the trial attorney of any obligation to investigate, prepare or present any penalty phase evidence in mitigation. No other federal court of appeals has reached a similar conclusion in the face of supported allegations that the defendant had serious mental health problems which impacted his decision to seek the death penalty.

In a case similar to the case at bar in the Fifth Circuit, that court instructed that the defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyers' failure to investigate the intoxication defense." *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983), *reh'g denied*, 739 F.2d 187 (1984), *cert. denied*, 469 U.S. 1028 (1984). *Cf. Gray v. Lucas*, 677 F.2d 1086, 1093-94 (5th Cir. 1982), *cert. denied*, 461 U.S. 910 (1983) (a capital defendant's stated desire not to use character witnesses does not negate the counsel's duty to investigate). Although the court ultimately held that the habeas petitioner was not prejudiced thereby, the Fifth Circuit concluded that trial counsel's failure to investigate the intoxication defense fell below an objective standard of reasonableness,

despite his client's directive. In so finding, the court relied on the fact that counsel never discussed the intoxication defense with their client.

The Eighth Circuit has also held that the a capital defendant's directive not to introduce evidence in mitigation does not override counsel's duty to investigate, particularly when evidence of a history of mental health problems is available. *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

The Eleventh Circuit, too, has addressed this situation where a capital defendant with mental health problems has advised counsel not to present mitigating evidence. *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986). The Eleventh Circuit's analysis is particularly instructive.

> The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence in court is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering potential merit. ... An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.

Thompson, 787 F.2d at 1451 (citations omitted). *See also*, *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) ("The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called."); *Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986) (defendant's statements that 'he did not want to take the stand and did not want anyone to cry for him' did not warrant counsel's failure to investigate available mental health evidence in mitigation).

The Fourth Circuit in the case at bar affirmed the district court's conclusion that "once a petitioner knowingly makes a decision and is not incompetent, the attorney has an

ethical duty to comply with those wishes." Order and Recommendation of the United States Magistrate Judge, at 50, *Lawson v. Dixon*, No. C-88-738-S (November 19, 1991) (citations omitted). The Eleventh Circuit has explicitly held, contrarily, that competence is not the linchpin.

> The district court also rejected the contention that Blanco's mental health mitigating evidence demonstrated ineffectiveness because Blanco did not show that he was incompetent at the time of trial. But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

Blanco, 943 F.2d at 1503, *citing Perri v. State*, 441 So. 2d 606, 609 (Fla. 1983).

The district court below also put great stock in trial counsel's testimony at the state post-conviction hearing (on another issue, not ineffectiveness for failure to develop mental health evidence) that "counsel found that petitioner's mental processes, reasoning and logic were perhaps the best of any client he had represented." Order and Recommendation of the United States Magistrate Judge, *Lawson v. Dixon*, No. C-88-738-S (November 19, 1991) at 40. However, numerous courts have concluded that this is an unreliable method for concluding there is an absence of mental health problems. For example, the Sixth Circuit has said that "the fact that a person is intelligent does not represent proof that he is free from mental illness." *United States v. Tate*, 419 F.2d 131, 132 (6th Cir. 1969). *See also*, *Thompson*, 787 F.2d at 1451 (11th Cir. 1986) (lawyer cannot 'blindly follow' client's instructions especially where his judgment may be impaired by mental difficulties).

In the case at bar, petitioner alleged in federal court that he had been denied the effective assistance of counsel due to counsel's failure to investigate, develop and present available mental health evidence in mitigation of the death sentence. The facts available supporting this allegation included the Discharge Summary from Dorothea Dix Hospital following Lawson's brief hospitalization for a competency evaluation requested by predecessor trial counsel and conducted prior to trial. Lawson argued in the court below that this report would have indicated sufficient mental health problems to have warranted further investigation. That Discharge Summary noted that Lawson had reported previous suicidal thoughts and one attempt, and that "Lawson's projective drawings suggest significant psychopathology . . . ." Additionally, included in the court file at the time that trial counsel undertook the representation of Mr. Lawson was the court order authorizing Lawson's hospitalization at Dorothea Dix Hospital for a competency evaluation. That order contained findings of fact that predecessor trial counsel

> . . .has consulted with the Defendant and found the Defendant to be in such a mental state that the Defendant cannot adequately assist defense counsel with the preparation of the Defendant's defense.
>
> 5. That the Defendant has exhibited the following characteristics in conduct: inability to communicate with his attorney, depression, lapse of memory, anxiety, and a general lack of ability to understand the nature and seriousness of the charges against him.

Order for Mental Evaluation, *State v. Lawson*, 80 CRS 18307 (Cabarrus Co. Super. Ct. January 29, 1981). In spite of this information, trial counsel did not obtain the remaining records from Dorothea Dix Hospital. In a similar situation, the Fifth Circuit has held this to be ineffective assistance of counsel. *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987)

(where counsel makes some exploration of the insanity defense but fails to take an obvious and readily available investigatory step which would have made the defense viable . . . courts may find ineffective assistance of counsel). *See also*, *Bouchillon v. Collins*, 907 F.2d 589, 596 (5th Cir. 1990) (trial counsel "made no phone calls, did not request Bouchillon's medical records, did not talk to witnesses regarding Bouchillon's mental problems -- in short, he did no investigation of any kind because he said that Bouchillon appeared rational."). In *Bouchillon*, the Fifth Circuit summed up counsel's duty by noting "it must be a very rare case indeed where a decision not to investigate would be "reasonable" after counsel has notice of the client's history of mental problems." *Ibid.*

Lawson also alleged prejudice from trial counsel's inexplicable omissions of investigation. Lawson alleged facts about his background which supported his claims of serious mental health problems, including serious depression, and proffered to the district court the affidavit of Dr. Billy Royal, a psychiatrist who was formerly employed by Dorothea Dix Hospital and who indicated that he had conducted over one thousand forensic evaluations. Dr. Royal opined that Lawson suffered serious psychopathology, including depression, which affected his behavior at the time of the offense and at the time he requested the death penalty from the jury. Importantly, Dr. Royal's affidavit, while not attached to the petition for writ of habeas corpus, was alluded to in the petition, so the State was or reasonably should have been aware that petitioner intended to rely on expert mental health testimony in support of his claims. *See* Petition for Writ of Habeas Corpus at 39, *Lawson v. Dixon*, No. C-88-738-S (M.D.N.C. filed July 13, 1988). In addition, petitioner also proffered the affidavit of Mavis Lawson, his mother, to establish prejudice from counsel's

failure to investigate, develop and present mental health evidence in mitigation. Mrs. Lawson's affidavit corroborated much of the self-reported history contained in Dr. Royal's affidavit, so there could be no serious challenge to the facts underlying Dr. Royal's affidavit. *See, e.g., Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992) (ineffective assistance of counsel in failing to establish factual support for psychiatric testimony through other sources where prosecution effectively challenged factual basis for defense psychiatric evidence by attacking defendant's credibility).

Finally, the case presented here is clearly distinguishable from cases in which the defendant instructs counsel not to pursue an available defense and there is no mental health evidence that would give a reasonable person pause in relying on such an instruction. *See, e.g., Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993); *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985). In *Mitchell*, mental health evidence was not at issue, and the defendant instructed counsel not to present the testimony of family members in mitigation. In *Jeffries*, counsel had fully investigated the case in mitigation; the question presented there was not ineffectiveness for failure to investigate, but rather ineffective assistance for failure to present available mitigation evidence. Here, there was available evidence suggesting "significant psychopathology" which should have led trial counsel to conduct an investigation into his client's mental health status and to inform his client of the availability of mental health evidence in mitigation. Additionally, given the extent of the mental health evidence such an investigation would have uncovered, that evidence should have been presented to the sentencing jury. Such evidence would have established two statutory mitigating factors under North Carolina law. N.C.G.S. §§15A-2000(f)(2) ("the capital felony was committed

while the defendant was under the influence of mental or emotional disturbance"); (f)(6) ("the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired"). In addition, there would have been non-statutory mitigating factors available for the jury's consideration from the evidence of Lawson's "significant psychopathology." There was clear prejudice from counsel's failures since, under North Carolina law, a defendant can be sentenced to death only upon a unanimous verdict that the aggravating circumstances are sufficiently substantial, when considered together with the mitigating circumstances, to warrant imposition of the death penalty. *See McKoy v. North Carolina*, 494 U.S. 433 (1990). Therefore, "since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be, [t]here is a reasonable probability that but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different." *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (citations omitted).

2. Whether This Court Should Resolve A Split Among the Federal Courts Of Appeals And State Courts Regarding The Constitutionality Of A Penalty Phase Jury Instruction Which Requires The Jury To Find And List Mitigating Factors But Which Does Not Explicitly Instruct It To Do So Pursuant To This Court's Decisions In *Mills v. Maryland*, 486 U.S. 367 (1988) And *McKoy v. North Carolina*, 494 U.S. 433 (1990)?

At the penalty phase of the trial, petitioner's jury was instructed that the State must prove three things in order to sentence petitioner to death: "that one or more aggravating circumstances existed; that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty; and, third, that the aggravating circumstances found by you are sufficiently substantial to outweigh any

mitigating circumstance or circumstances found by you. If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death." Because one statutory mitigating circumstance was proved by the defendant's testimony and was unrebutted by the State, to-wit, that the defendant testified truthfully on behalf of the prosecution in another prosecution of a felony, N.C.G.S. §15A-2000(f)(8), the trial court, pursuant to North Carolina law, instructed the jury peremptorily to answer "yes" to the question whether one or more mitigating circumstances existed. The court then instructed the jury as to issue four, the weighing of aggravating circumstances against mitigating circumstances. The instructions were that in order to sentence the defendant to death, the jury must "find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg [sic] any mitigating circumstance or circumstances found by you."

In instructing the jurors as to particular functions that they were to perform, the trial court routinely used the collective pronoun "you" at least nine times. At no time did the court explain to the jurors that each could independently consider mitigating evidence and employ those individual determinations in the final decision-making process of whether the appropriate sentence should be life or death. Although the jury was never explicitly instructed that it must be unanimous as to its findings on the existence of mitigating factors, such an interpretation is the only reasonable interpretation that can be made of these instructions. This is particularly true in light of the Issues and Recommendation sheet for submitted to the jury for recordation of the answers to the special sentencing inquiries. Under issue three, which asked, "Do you find one or more mitigating circumstances?" the

form left a single blank to answer the question "yes" or "no." The form listed three statutory mitigating circumstances for the jury's consideration on the sheet. The first was whether the defendant "has no significant history of prior criminal activity." N.C.G.S. §15A-2000(f)(1). The second was whether the defendant "testified truthfully on behalf of the prosecution in another prosecution of a felony." N.C.G.S. §15A-2000(f)(8). As noted above, the court instructed the jury peremptorily to answer "yes" to the overarching question of whether it found one or more mitigating factors because of the existence of this mitigating circumstance. Finally, the form listed whether there existed "any other circumstance or circumstances arising from the evidence which you **the jury** deem to have mitigating value." N.C.G.S. §15A-2000(f)(9) (emphasis added). There were a number of non-statutory mitigating factors which the jury could have found and which were supported by evidence developed during the guilt phase of the trial, including the testimony of Phyllis Soden that after she and petitioner had a fight, petitioner came to her to apologize and express his care and concern for her. Ms. Soden testified that she never saw David act violently, and that she thought of the petitioner as a friend. She also testified that when he was a boarder at her house, he was neat and clean, and did things to help take care of the house. Another guilt phase witness, Harley Tucker, testified that he knew petitioner was from a broken home, that his parents were split up, and that petitioner was raised by his mother. Under the instructions received orally and on the Issues sheet, no juror could consider as mitigating these circumstances unless all jurors unanimously found them to be mitigating.

Empirical evidence supports petitioner's common-sense reading of these instructions. In one study, a group of fifty-seven subjects was provided instructions which, as was the case

with the instructions at issue in this case, did not explicitly require unanimity in the consideration of mitigating circumstances. A second group of fifty-eight subjects was provided instructions explicitly requiring unanimity as to mitigating circumstances. After each group "deliberated" about a punishment based on a common set of facts, they were questioned about their deliberations. When asked if the instructions required unanimity as to the consideration of mitigating circumstances, ninety-three percent of the subjects who were not explicitly instructed about how to find mitigating circumstances believed they had to agree unanimously before considering any of those circumstances. J. Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUMAN BEHAV. 203 (1992).

In spite of all this, the Fourth Circuit held that the instructions in this case "does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor." *Lawson*, 3 F.3d at 754, *citing Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991). This language suggests that, while paying lip service to *Mills v. Maryland*, 486 U.S. 367 (1988) (ambiguous jury instructions would be understood by reasonable jury to unconstitutionally require unanimity for the consideration of any mitigating factor), the Fourth Circuit dismissed the claim because there was no **explicit** unanimity requirement. Even if, however, the Fourth Circuit's holding reflected a consideration that these instructions would not reasonably have been understood by the jury in an unconstitutional manner, *see Boyde v. California*, 494 U.S. 370 (1990), that holding would be in conflict with other federal courts of appeals and state courts, and would be in error. *See, e.g., Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (instruction which can

reasonably be understood to require a unanimous verdict to impose a life sentence violates *Mills*); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989) (same).

The sentencing verdict form submitted to the jury provided only one blank space for answers to the questions submitted to it, including the question regarding the existence of mitigating circumstances. The Supreme Courts of Wyoming and Georgia considered this fact to be crucial in their holdings that penalty phase forms which provided only one space for an answer as to the existence of mitigating factors created unconstitutional risks that jurors were precluded from the consideration of mitigating factors by a unanimity requirement. *Engberg v. Meyer*, 820 P.2d 70, 93 (Wyo. 1991); *State v. Brantley*, 262 Ga. 786, 427 S.E.2d 758 (1993). In Brantley, the Georgia Supreme Court concluded that "[r]equiring a written finding on mitigating circumstances, signed by the foreperson, implicitly imposed a unanimity requirement on mitigating circumstances." *Id.* at 765. The instructions here, combined with the Issues and Recommendation sheet, make the error even more clear than that in *Brantley*. Given the degree of disagreement among the federal and state courts as to this issue, certiorari is warranted in this case.

There is no retroactivity bar to this Court's consideration of this claim in habeas corpus proceedings. The Fourth Circuit has held that *Mills* and *McKoy* fall within the second exception to the rule prohibiting consideration of new rules in habeas corpus proceedings announced in *Teague v. Lane*, 489 U.S. 288 (1989). *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992). Moreover, the State waived the non-retroactivity defense by failing to assert it until after it had lost on the merits of *McKoy* in this Court. For this reason as well,

the Fourth Circuit held, in *Williams*, the State had waived the defense. *Williams*, 961 F.2d at 457.

3a. Whether A Defendant Who Requests The Death Penalty Thereby Waives His Sixth Amendment Right To Effective Assistance Of Counsel At The Penalty Phase Of His Trial And His Eighth Amendment Right To Heightened Reliability In The Determination That Death Is The Appropriate Punishment In A Given Case?

3b. If So, Must Such A Waiver Be Knowing And Intelligent?

3c. Whether The Court Of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim That He Did Not Knowingly And Intelligently Waive His Sixth and Eighth Amendment Rights By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That Petitioner Show Clear And Convincing Evidence, Both Positive And Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?

In *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017 (1989), the Supreme Court of New Jersey held that even if a defendant asks the jury for the death sentence, trial counsel must nevertheless provide evidence of mitigating circumstances as a matter of federal constitutional law.

> Requiring a jury to consider mitigating evidence is necessary to prevent death sentences that are 'wantonly and freakishly imposed.' Consideration of mitigating circumstances is essential to individualized determinations. Refusal to present mitigating evidence prevents the jury from considering crucial information in making its decision. Without a record concerning mitigating evidence we [the reviewing court] would be unable to fulfill our constitutional and statutory duty to review the proportionality of a defendant's sentence.

State v. Hightower, 120 N.J. 378, 415, 577 A.2d 99, 117 (1990), *citing Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J. concurring). In one recent case in Florida in which a defendant refused to cooperate with his counsel regarding the presentation of mitigating

evidence, the trial court appointed special counsel to prepare and present mitigating evidence to represent the public interest in bring forth mitigating factors to be considered by the court in the sentencing proceeding. *State v. Klokoc*, 589 So.2d 219 (Fla. 1991). On appeal, appointed counsel was ordered by the Florida Supreme Court to proceed as diligent appellate counsel in spite of his client's wishes. *Klokoc*, 589 So.2d at 222 ("Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.")

The Florida Supreme Court has been unwilling to extend the holding in *Klokoc*, see, *e.g.*, *Hamblen v. State*, 527 So.2d 800 (Fla. 1988) (Hamblen made a knowing, intelligent and voluntary waiver of his right to counsel and represented himself and decided himself to not submit any evidence in mitigation of the death sentence). Nevertheless, that court, and others, require that waivers be knowing, intelligent and voluntary. *Id.* Similarly, Georgia has required that where the defendant seeks the death penalty, there must be a knowing, intelligent and voluntary waiver of Sixth and Eighth Amendment rights. *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988) ("Where a properly-informed, competent defendant insists that he prefers a death sentence to life imprisonment, his attorney does not violate any right of the defendant by attempting to comply with his client's wishes.") (citations omitted). However, the Georgia Supreme Court made clear that the inquiry went beyond the attorney's duty.

> However, although the defendant may have a right to present his personal desires to the court, those desires are not controlling. As the trial court recognized, its responsibilities are much broader than the defendant's own wishes, and the imposition of a death sentence would be authorized only when, as here, the court has satisfied itself (1) that the existence of at least one statutory aggravating circumstance has been proven beyond a reasonable doubt, and (2) considering all the facts and circumstances presented to the court, the death sentence is the appropriate punishment.

Morrison, 373 S.E.2d at 509. The court did not stop there, however, opining in dicta that "the trial court in a case like this may have an obligation to conduct an independent investigation into the possible existence of evidence in mitigation." *Ibid.* In *Morrison*, the trial court called as court experts two psychiatrists who had evaluated Morrison, as well as an investigator from Tennessee regarding Morrison's cooperation with the Tennessee authorities when he was arrested. *Ibid.* While the Ninth Circuit has likewise refused to hold that no waiver can be made, it too has suggested, in dicta, that such a waiver must be made knowingly and intelligently. *Jeffries v. Blodgett*, 988 F.2d 923, 940 (9th Cir. 1993).

In the instant case, of course, petitioner was disallowed from putting on evidence establishing that petitioner was either not competent to make, nor, alternatively, made a knowing, intelligent and voluntary waiver. *Lawson*, 3 F.3d at 754. The Fourth Circuit held that in order for Lawson to be entitled to an evidentiary hearing on his claim that he either was not competent to waive his constitutional rights, nor did he do so knowingly, intelligently and voluntarily, he was required to show, by clear and convincing evidence of positive and unequivocal facts generating a substantial and legitimate doubt as to his mental competency. *Ibid.* No other court has held a petitioner to that standard. *See, e.g., Smith v. Kemp*, 664 F.Supp. 500 (M.D.Ga. 1987), *aff'd by equally divided court sub. nom. Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (*en banc*). For clarity, petitioner clearly concedes that his claim below that the standard for competence to waive known constitutional rights is different from the *Dusky* standard is foreclosed by this Court's recent decision in *Godinez*

v. Moran, 509 U.S. ___, ___ S.Ct. ___, 124 L.Ed.2d ___ (1993) (competence to stand trial is the same as competence to plead guilty or to waive counsel; does not deprecate other requirement that waivers be knowing and intelligent), and he does not assert it here.

He does, however, assert that he had a right to present evidence in federal court to establish that he did not knowingly and intelligently waive his rights to counsel and to a reliable sentencing determination, as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Lawson alleged in his habeas petition that he waived those rights by his instruction to counsel not to present mitigating evidence and his request to the jury to be sentenced to death. He further alleged such waiver was not knowing and intelligent. He supported these allegations by proffering that trial counsel materially misinformed him of his parole eligibility if he were sentenced to life imprisonment and by proffering the affidavit of Billy Royal, M.D., who opined that Lawson's psychopathology deprived him of the ability to make a knowing and intelligent waiver of his rights. This evidence would, if proved, entitle petitioner to relief. Since this claim was not presented to the state courts, the State waived the exhaustion requirement, and the court below held that North Carolina's permissive procedural default rule precluded it from holding the claim defaulted, petitioner was entitled to an evidentiary hearing in district court. *Townsend v. Sain*, 372 U.S. 293 (1963). This Court's recent decision holding that where a petitioner has failed to develop facts in state court, he must show cause and prejudice for the failure in order to be entitled to an evidentiary hearing in federal court, *Keeney v. Tamayo-Reyes*, 504 U.S. ___, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), does not apply in this situation. Nothing in the Court's opinion in that case suggests that the state there waived the exhaustion requirement, nor

that the federal courts would not apply a procedural default in the absence of a state court holding because of the permissive nature of the statutory rule. Hence, the Fourth Circuit's unique and unreasonably high standard for obtaining an evidentiary hearing on this claim, in contrast with other courts, warrants this Court's grant of certiorari.

4a. Whether The Court of Appeals Erred In Holding That Petitioner Was Not Entitled To An Evidentiary Hearing On His Claim Of Ineffective Assistance Of Counsel For Failure To Investigate, Develop, And Present Available Mental Health Evidence In Mitigation Of The Sentence Of Death?

4b. Did The Court Err By Requiring As The Standard Petitioner Must Meet, Contrary To Other Federal Courts Of Appeals, That The Petitioner Show Clear and Convincing Evidence, Both Positive and Unequivocal, That Creates A Real, Substantial, And Legitimate Doubt With Respect To The Petitioner's Mental Capacity?

As noted in Claim 1, above, petitioner asserted that he was denied the effective assistance of counsel at the penalty phase of his trial by counsel's failure to investigate, prepare and present available mental health evidence in mitigation of the sentence of death. As noted in Claim 3c., above, the Fourth Circuit established a unique and unreasonably high standard of proof in order for a habeas claimant to obtain an evidentiary hearing on this ineffectiveness claim. The standard, the presentation of clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to the petitioner's mental capacity, *Lawson*, 3 F.3d at 754, was taken from the standard for a habeas petitioner seeking to obtain an evidentiary hearing on a claim that he was substantively not competent at the time of trial. *See, e.g., Card v. Dugger*, 911 F.2d 1494, 1519-20 (11th Cir. 1990); *Flugence v. Butler*, 848 F.2d 77, 79 (5th Cir. 1988).

Those federal courts do not, however, apply this standard to a claim of ineffective assistance of counsel for failure to investigate, develop and present available mental health evidence in mitigation of the sentence of death. Those circuits have simply applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Townsend v. Sain*, 372 U.S. 293 (1963). *See, e.g., Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

> The district court also rejected the contention that Blanco's mental health mitigating evidence demonstrated ineffectiveness because Blanco did not show that he was incompetent at the time of trial. But there is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.

Blanco, 943 F.2d at 1503, *citing Perri v. State*, 441 So. 2d 606, 609 (Fla. 1983). Insofar as the Fourth Circuit has established this unique and wholly unreasonable standard for obtaining an evidentiary hearing on a claim of ineffective assistance of counsel for failure to investigate, develop and present mental health evidence in mitigation of the death sentence, and it is in conflict with other federal courts of appeals, this Court should grant certiorari to decide the appropriate standard.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted, this 24th day of January, 1994.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served on counsel for the State by mailing a copy of same to Joan H. Byers, Esquire, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina, 27602, with sufficient postage affixed thereto.

Marshall Dayan

APPENDIX

plicable to the employee, Hawkes, was reasonable, but in doing so it would have severely to limit, curtail or even contradict what it has said before. I do not accept that we are free to treat a controlling state rule of law applied by the highest court in the Commonwealth of Virginia so cavalierly.

Accordingly, I would hold the non-compete clause overbroad and hence invalid. I would uphold the district court throughout. So to that extent I dissent.

David LAWSON, Petitioner–Appellant,

v.

Gary DIXON, Warden, Central Prison, Raleigh, North Carolina, Respondent–Appellee. (Two Cases)

Nos. 92–4003, 92–4004.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 3, 1992.

Decided Aug. 26, 1993.

Petitioner was convicted of first-degree murder and sentenced to death, in the state courts. After exhausting state appellate remedies, petitioner sought federal writ of habeas corpus. The United States District Court for the Middle District of North Carolina, Frank W. Bullock, Jr., Chief Judge, denied writ and appeal was taken. The Court of Appeals, Ervin, Chief Judge, held that: (1) petitioner was not entitled to evidentiary hearing on his request for psychiatric expert assistance; (2) defendant was not entitled to evidentiary hearing on mental health claims; and (3) prosecutorial comments did not prejudice defendant.

Affirmed.

1. Costs ⇐302.2(2)

Appointment of an expert for purposes of mounting defense at trial is mandatory, under statute applying to criminal cases generally, if defendant satisfies statutory prerequisites of indigence and necessity. 18 U.S.C.A. § 3006A(e), (e)(1).

2. Habeas Corpus ⇐883.1

Congress has mandated application of federal funds for legal representation of habeas corpus petitioners, as well as investigative, expert and other services, under the Comprehensive Drug Abuse Prevention and Control Act, provided petitioner can demonstrate that he is financially unable to secure assistance on his own and that such assistance is "reasonably necessary" for his representation. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(4)(B), (q)(9), 21 U.S.C.A. § 848(q)(4)(B), (q)(9).

3. Habeas Corpus ⇐847

Magistrate judge did not commit reversible error, even though he moved sua sponte to hold hearing at which effect of mental health expert's assistance on habeas petitioner's claims would be ascertained, rather than holding ex parte hearing on motion; there was concern that presence of expert might cause expansion of petitioner's claims regarding his mental condition, beyond scope of claim raised in petition, creating potential exhaustion of state remedies problem and risk that entire petition would be required to be dismissed as "mixed," even though state had waived right to assert exhaustion claims. 18 U.S.C.A. § 3006A(e); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

4. United States Magistrates ⇐21

Magistrate judge was not required, under applicable statutes, to hold ex parte evidentiary hearing, at which petitioner's motion for psychiatric expert assistance could be adjudicated. 18 U.S.C.A. § 3006A(e)(1); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

5. Habeas Corpus ⇐883.1

Appointment of psychiatric expert to assist habeas petitioner was not "necessary" or "reasonably necessary," as required for government to bear expense; as petition had already been filed, expert's help was not necessary in that phase, and expert had already formed opinion as to mental condition of petitioner. 18 U.S.C.A. § 3006A(e)(1); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(9), 21 U.S.C.A. § 848(q)(9).

6. Habeas Corpus ⇐748

Habeas petitioner is not entitled to evidentiary hearing on mental competency claims unless he presents clear and convincing evidence that creates real, substantial, and legitimate doubt with respect to petitioner's mental capacity and ability to assist his counsel at trial, which is both positive and unequivocal.

7. Habeas Corpus ⇐748

In order to meet standard for obtaining evidentiary hearing on mental competency claim, habeas petitioner must present history of mental illness, or substantial evidence of mental incompetence at or near time of trial supported by opinions of qualified physicians and testimony of laymen.

8. Criminal Law ⇐798(.5)

Trial court instruction in murder case, requiring jury to find unanimously beyond reasonable doubt that aggravating circumstances found by jury outweigh any mitigating circumstance or circumstances found by jury, was not erroneous even though instruction did not specify that jury did not have to agree on existence of particular mitigating circumstance.

9. Criminal Law ⇐772(6)

Instruction, that a jury finding that defendant had intentionally killed victim with deadly weapon proximately causing death would result in the law implying deed was done with malice, was not error even though it was claimed jury should have been informed that finding allowed inference of malice; instruction merely shifted burden of production of malice evidence to defendant, but did not shift ultimate burden of proof.

10. Constitutional Law ⇐268(8)

Criminal Law ⇐723(1)

Due process rights of defendant were not prejudiced in state court murder trial even though prosecution improperly stated in summation of guilt phase that victim's house was not his castle but his "crucifixion block" and that it was "sickening to me to think that defendants are tried in the beautiful courtroom like this," and that defendant's constitutional rights should be compared with those of victims; evidence of guilt was overwhelming. U.S.C.A. Const.Amend. 14.

Marshall Lawrence Dayan, Office of Appellate Defender, North Carolina Resource Center, Raleigh, NC, argued (Harry L. Hopkins, Jr., Atlanta, GA, on brief), for petitioner-appellant.

Joan Herre Byers, Sp. Deputy Atty. Gen., North Carolina Dept. of Justice, Raleigh, NC, argued (Lacy H. Thornburg, Atty. Gen. of North Carolina, Barry S. McNeill, Sp. Deputy Atty. Gen., on brief), for respondent-appellee.

Before ERVIN, Chief Judge, and WIDENER and NIEMEYER, Circuit Judges.

OPINION

ERVIN, Chief Judge:

These consolidated appeals arise from the district court's dismissal of David Lawson's petition for the writ of habeas corpus, 28 U.S.C. § 2254, and concomitant denial of his motion for relief from judgment, Fed.R.Civ.P. 60(b). Finding no merit in Lawson's five assignments of error to the judgments below, we affirm.

I

A detailed recitation of the facts surrounding the crimes of which Lawson was convicted may be found in the opinion of the Supreme Court of North Carolina on direct appeal. *See State v. Lawson*, 310 N.C. 632, 634–38, 314 S.E.2d 493, 495–96 (1984). The following paragraphs summarize this factual

background and the criminal proceedings it spawned.

In December 1980 Buren Shinn and his son Wayne resided in houses approximately 100 yards apart on Old Salisbury Road some three miles from Concord, North Carolina. Buren and Wayne worked together in a family electrical repair business headquartered at Buren's house. After driving to work early on the morning of December 4, 1980, Wayne heard the burglar alarm sound in his own house. Buren and Wayne immediately leapt into Wayne's truck and proceeded to Wayne's house, where they observed a dirty, brown Ford automobile parked in the driveway. Wayne left the truck and ran towards the patio that lay on one side of the house. Buren saw Wayne throw up his hands and walk through a set of sliding glass doors, whereupon Buren heard two or three shots ring out. Buren ran to the truck, got in, and began backing the truck in an effort to escape. A man ran towards him, waving a pistol. His attention diverted, Buren backed the truck into a ditch. The man approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with the man not to hurt him.

Before Buren reached the patio, he heard another gun shot and felt a sharp blow to his head. He fell to the ground, unconscious. When Buren regained consciousness he found himself lying in a large pool of blood. Fearing that his assailant might still be in the vicinity, he kept silent. Some twenty or thirty minutes later, Buren heard someone walk toward him and felt a hand reach into his pocket and remove his wallet. Buren remained motionless for twenty more minutes. Hearing no footsteps and seeing no one, he began to crawl from the patio toward the road, hoping to halt a passing car. When no one stopped, he struggled to his feet and walked home. After telephoning for help, Buren's second son, Jerry, left to check on his brother's condition. Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound to the head. Buren's injuries were not severe, for the bullet which struck him did not penetrate the skull. He recovered after a short hospital stay.

The police found Wayne's house ransacked. They discovered a pillowcase containing several pieces of jewelry and a camera, apparently dropped by the intruder. Marks on the kitchen door indicated that the house had been forcibly entered.

David Lawson was charged in the Superior Court of Cabarrus County with three crimes: (1) the first-degree murder of Wayne Shinn; (2) the assault with a deadly weapon with intent to kill inflicting serious injury on Buren Shinn; and (3) the felonious breaking and entering of the home of Wayne Shinn. The State's case-in-chief consisted primarily of the testimony of two witnesses: Buren Shinn and Phyllis Soden. When Buren Shinn took the stand, he identified Lawson as his assailant, and related the facts set forth above. Phyllis Soden, with whom Lawson once had shared a residence, testified that she returned home from work at about 4:00 a.m. on December 4, 1980. Shortly after 9:00 a.m. Lawson arrived at Soden's house and stated that he needed her to "take him someplace immediately." Leaving his brown Ford in her driveway, the two departed in her automobile. Lawson directed Soden to drive on Old Salisbury Road. As they neared Wayne Shinn's residence Lawson told Soden to stop, let him out, drive a short distance farther, turn around, and return to pick him up. Soden followed Lawson's directions. When she returned to Shinn's house, Lawson ran to the car carrying a crowbar. After they returned to Soden's residence, Lawson explained that he had broken into a house and left the crowbar there. Fearing that the crowbar might have his fingerprints on it, he had been anxious to retrieve it. A little later Lawson showed Soden a wallet and removed the money from it. He told Soden that he had broken into a house after hearing that the residents had gold and jewelry.

According to Soden's testimony, Lawson told her that he had found some items in the house and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. Lawson pointed his gun at the man, who promptly put up his hands. Law-

son then ordered the man to turn around, whereupon he shot him in the back of the head. After the man fell, Lawson ran out of the house and spied another man approaching the patio. The other man turned, ran, and got into a truck. Lawson ordered the man out of the truck. Although the man begged Lawson not to shoot, Lawson forced him to walk toward the patio and shot him in the back of the head. He was confident that both men were dead because he shot them at close range. Lawson killed them, according to Soden, both in order to eliminate witnesses to the robbery and because he did not want to "go back to prison."

Lawson offered no evidence during the guilt-innocence phase of the trial. After the jury returned guilty verdicts on all three charges, the proceedings turned to a consideration of sentence. In open court but outside the presence of the jury, Lawson was examined under oath by his attorney, James C. Johnson. During this examination Lawson testified that Mr. Johnson had fully advised him regarding the nature of the sentencing phase of the proceeding. Lawson also acknowledged that on June 6, 1981 he signed an affidavit in which he acknowledged that he told Mr. Johnson

> on at least five occasions ... that I should be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The superior court then advised Lawson that, notwithstanding his desire to be sentenced to death, the jury must decide his punishment and that the court was required by law to submit whatever aggravating and mitigating circumstances were supported by the evidence to the jury for consideration. The court stated: "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may ... still see fit to recommend life imprisonment."

The jury was then brought back into the courtroom. Lawson testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the State "involving some criminal matters in Stanly County some years ago." The following colloquy then took place between Lawson and his attorney:

> Q: At this time would you tell the jury what your request is regarding their decision?
>
> A: I'd like the death penalty.
>
> Q: Would you care to tell us why you want the death penalty?
>
> A: To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life, that's not right. You think I done it, gas me.
>
> Q: And you're—you know what you're asking?
>
> A: Yes, sir.
>
> Q: You know it's my responsibility to try to save your life?
>
> A: Yes, sir.
>
> Q: That's all.

A brief cross examination by the state followed, during which Lawson admitted that he owned a .32 calibre pistol in September 1980; that he attempted to purchase a pistol shortly after December 4, 1980; and that on December 4, 1980 he had gone to Salisbury with Phyllis Soden. At the guilt-innocence phase of the trial, a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 calibre bullet.

The jury found as aggravating circumstances that the murder of Wayne Shinn was "committed for the purpose of avoiding a lawful arrest" and was "part of a course of conduct in which [Lawson] engaged and [which] include[d] the commission by the defendant of other crimes of violence against [another person]." *See* N.C.Gen.Stat. § 15A–2000(e)(4) & (11) (1988 & Supp.1992).

The jury next found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Two specific mitigating circumstances were submitted: (1) that Lawson had no "significant prior history of criminal activity," and (2) that Lawson "testified truthfully on behalf of the prosecution in another prosecution of a felony." *See id.* § 15A–2000(f)(1) & (8). The jury also was asked to consider whether any other circumstances existed which it deemed to have mitigating value. *See id.* § 15A–2000(f)(9). The jury did not specify which of the mitigating circumstances it found, but it did indicate that it found the existence of "one or more mitigating circumstances." The jury finally found that the aggravating circumstances outweighed the mitigating circumstances and recommended that Lawson be sentenced to death by administration of lethal gas.

Following affirmance of his convictions and death sentence by the Supreme Court of North Carolina, *see State v. Lawson*, 310 N.C. 632, 634, 314 S.E.2d 493, 495 (1984), and the denial of his petition for the writ of certiorari by the Supreme Court of the United States, *see Lawson v. North Carolina*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985), Lawson filed a motion for appropriate relief pursuant to N.C.Gen.Stat. § 15A–1411 (1988 & Supp.1992) in the Superior Court of Cabarrus County, raising claims of ineffective assistance of counsel at trial and on direct appeal.[1] Lawson's motion also challenged the impartiality of the jury empaneled to try his case and the sufficiency of the evidence supporting the aggravating circumstances as found by the jury. Later Lawson amended his motion for appropriate relief to challenge the State's excusal for cause of jurors with scruples against capital punishment. He then further amended it to allege (1) a claim of ineffective assistance of counsel in failing to present mitigating evidence at the penalty phase of the trial; (2) the absence of a reliable sentencing determination because of the absence of mitigating evidence; (3) the unconstitutionality of a jury instruction imposing on the jury a duty to pronounce the death sentence if aggravating circumstances outweighed mitigating circumstances; and (4) ineffective assistance of counsel in failing to have transcribed and to present the closing arguments of counsel at trial to the Supreme Court of North Carolina for review. Following an evidentiary hearing, the superior court denied the motion for appropriate relief as amended. Both the Supreme Court of North Carolina, *see State v. Lawson*, 322 N.C. 114, 367 S.E.2d 919 (1988), and the Supreme Court of the United States, *see Lawson v. North Carolina*, 485 U.S. 1016, 108 S.Ct. 1494, 99 L.Ed.2d 883 (1988), denied Lawson's petitions for appellate review.

On July 12, 1988, assisted by new counsel, Lawson sought federal collateral relief by filing the instant petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of North Carolina. Lawson acknowledged that many of the claims raised by his petition had not been presented to the Superior Court of Cabarrus County in his motion for appropriate relief. The petition assigned multiple claims of constitutional error to the guilt-innocence and sentencing phases of his trial, and set forth in summary form the facts supporting each claim. Rather than await the dismissal of this "mixed" petition as required by *Rose v. Lundy*, 455 U.S. 509, 520–21, 102 S.Ct. 1198, 1204–05, 71 L.Ed.2d 379 (1982), Lawson expeditiously filed a second motion for appropriate relief in the Superior Court of Cabarrus County, raising the previously unexhausted claims that appeared in the habeas petition. Lawson

1. Specifically, Lawson claimed that James C. Johnson, his counsel in the trial and appellate proceedings before the state courts of North Carolina, had rendered him ineffective assistance of counsel with respect to (1) his motion to change venue; (2) jury selection; (3) the identification procedures employed at trial; (4) his failure adequately to challenge the sufficiency of the evidence to support aggravating factors at the penalty phase on direct appeal; (5) his failure adequately to challenge the sufficiency of the evidence to support the jury's imposition of the death sentence; (6) his failure adequately to challenge the proportionality of the death sentence; (7) the preparation and filing of a petition for the writ of certiorari in the Supreme Court of the United States; and (8) the preparation of the record on appeal and the written brief in the Supreme Court of North Carolina.

asked the district court not to consider his habeas petition until the state remedies on claims first raised in the petition had been exhausted. The respondent,[2] objecting to Lawson's motion to hold the habeas petition in abeyance, asked the court to sever the exhausted from the unexhausted claims, adjudicate only the exhausted claims, and consider the unexhausted claims in a subsequent petition after the state courts had been afforded an opportunity to rule upon them. The district court rejected this approach, and referred the petition to a magistrate judge for recommended findings of fact and conclusions of law as permitted by 28 U.S.C. § 636(b)(1)(B).

The magistrate judge recommended that the petition be dismissed as "mixed" under *Rose v. Lundy*. The district court agreed, dismissed the petition, and dissolved the stay of execution it had entered to permit Lawson to seek federal collateral relief. In a motion to alter or amend judgment and a motion for relief from order brought pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, the respondent then repeated his request that the court not dismiss the petition but sever the unexhausted claims and adjudicate only the exhausted claims. The respondent filed a written statement specifically indicating that he would unconditionally waive the defense of nonexhaustion of state remedies if his motion to alter or amend was allowed.

On the basis of this promised waiver, the district court granted the respondent's motion, amended its judgment, and vacated its order dismissing the petition for failure to exhaust state remedies completely as to all claims raised in Lawson's habeas petition. The court rejected the respondent's proposal to sever the exhausted from the unexhausted claims and adjudicate only the exhausted claims. The court also rejected the respondent's alternative proposal that the court consider the exhausted as well as the unexhausted claims only on the record developed before and during direct appeal to the Supreme Court of North Carolina and on Lawson's first Motion for Appropriate Relief in the Superior Court of Cabarrus County.

On April 6, 1989 the magistrate judge heard oral argument on the issues raised by Lawson's petition, and held the litigation in abeyance pending disposition of state-court proceedings for reconsideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). On November 19, 1991 the magistrate judge filed an order recommending that Lawson's petition be dismissed and that his motions for discovery, appointment of a psychiatric expert, and an evidentiary hearing be denied. *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 7 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). The district court adopted the magistrate judge's recommendations, and entered a judgment dismissing the petition on January 7, 1992. *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 1–2 (M.D.N.C. Jan. 7, 1992) (judgment and order). Lawson then moved to alter or amend the judgment, and further moved for relief from the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure based on our decision in *Williams v. Dixon*, 961 F.2d 448, 451–59 (4th Cir.), *cert. denied* — U.S. —, 113 S.Ct. 510, 121 L.Ed.2d 445 (1992); both motions were denied.

Lawson gave notice of appeal as to both the dismissal of his petition and the denial of his Rule 60(b) motion. The appeals were consolidated for briefing and argument herein.

II

Certain aspects of the district court's treatment of Lawson's motion for the appointment of a psychiatric expert are relevant to the issues raised by these appeals. In his petition for the writ, Lawson raised four principal claims regarding the effect of his psychological health upon the guilt-innocence and sentencing phases of his trial. Specifically, he alleged (1) that he was not competent to be sentenced; (2) that he lacked sufficient ability to consult with his counsel with a reasonable degree of rational understanding and with a view to preparing his defense; (3) that he was not competent to, and did not, knowingly, intelligently, and voluntarily waive his constitutional right to a reliable sentencing determination; and (4) that his death sentence was rendered in the absence of a reliable sentencing hearing. On February 1, 1989, after his petition had been laid before the district court, Lawson filed, *ex parte*, a motion for the appointment of a psychiatric expert to assist in the development and presentation of his mental-health habeas claims, or in the alternative for an *ex parte* evidentiary hearing in which he would have the opportunity to show that expert psychiatric services were reasonably necessary to the full and fair adjudication of these claims. This motion was predicated upon provisions of the Criminal Justice Act, 18 U.S.C. § 3006A(e), and the Anti-Drug Abuse Act of 1988, 21 U.S.C. §§ 848(q)(4)(B) and (q)(9).

On April 4, 1989, acting *sua sponte*,[3] the magistrate judge held a hearing at which Lawson was required to reveal to the respondent the basis for his motion to appoint a psychiatric expert. After the hearing, the magistrate judge required Lawson to brief and identify those habeas claims for which he had requested an evidentiary hearing on the appointment motion. The respondent replied with a motion to dismiss the petition in its entirety, contending that the appointment motion so altered Lawson's habeas petition that it raised a new, unexhausted claim. According to the respondent, this new claim rendered the petition "mixed"—and therefore subject to dismissal—under *Rose v. Lundy*, 455 U.S. 509, 520–21, 102 S.Ct. 1198, 1204–05, 71 L.Ed.2d 379 (1982).

In his recommended findings of fact and conclusions of law, issued on November 19, 1991, the magistrate judge determined that Lawson's effort to expand his mental competency allegations with a new opinion from a psychiatric expert constituted a "significantly different claim" involving "critical factual evidence which would attempt to markedly improve the posture of [Lawson's] claim." *See Lawson v. Dixon*, No. C–88–738–S, slip op. at 16 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). Because the psychiatrist's testimony would have been the first evidence from any expert indicating possible mental incompetency, the magistrate judge held that Lawson's motion constituted a new (and therefore unexhausted) claim. *Id.* The magistrate judge further held, however, that the respondent should not be permitted to withdraw his unconditional waiver of exhaustion[4] simply because Lawson was attempting to introduce additional proof in support of his factual allegation of incompetency, which had been among the claims directly subject to the respondent's waiver. *Id.* at 17. The magistrate judge reasoned, *inter alia*, that the respondent should have known that the district court would not restrict its review of Lawson's claim to the record before the state

2. The respondent, Gary T. Dixon, is warden of Central Prison in Raleigh, North Carolina, where Lawson presently is incarcerated.

3. At the hearing on Lawson's motion, the magistrate judge made it clear that he had summoned both parties *sua sponte* to discuss the motion's impact on Lawson's habeas petition generally. *See, e.g.*, J.A. 742 (magistrate judge stating that "[t]he reason why I called you gentlemen is that I received an ex parte motion from the petitioner with respect to requesting the appointment of a psychiatric expert"); *id.* 744 (magistrate judge stating that "I just thought I'd call a hearing [to resolve Lawson's motion]").

4. The magistrate judge properly recognized that exhaustion is not a jurisdictional requirement, but rather arises from interests of comity between the state and federal courts. Indeed, whether a federal court of appeals should require exhaustion is under some circumstances discretionary. *See Granberry v. Greer*, 481 U.S. 129, 132–36, 107 S.Ct. 1671, 1674–76, 95 L.Ed.2d 119 (1987). Because exhaustion is not a jurisdictional bar, the state may waive it. *Id.* Yet the waiver must be unconditional. *See Sweezy v. Garrison*, 694 F.2d 331, 331 (4th Cir.1982) (per curiam), *cert. denied*, 461 U.S. 908, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983); *Harding v. North Carolina*, 683 F.2d 850, 852–53 (4th Cir.1982) (holding conditional waiver "flatly incompatible" with the spirit of the comity considerations inherent in the exhaustion requirement).

Although the instant case does not present, and we do not reach, the question of when a state's waiver of exhaustion as to particular issues in a section 2254 petition ought to be accepted or rejected, we agree with the Eighth and Eleventh Circuit Courts of Appeals that district courts have discretion to do either. *See Purnell v. Missouri Dep't of Corrections*, 753 F.2d 703, 708–10 (8th Cir.1985); *Thompson v. Wainwright*, 714 F.2d 1495, 1509 (11th Cir.1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984).

courts, as the respondent already had sought unsuccessfully to limit the court's consideration of the petition to the record previously developed before the state tribunals. *Id.* at 17–18.

Because neither party directly challenges on appeal the validity of the magistrate judge's holding with respect to the respondent's waiver of exhaustion, the question before us involves only the merits of the judge's denial of Lawson's motion. The magistrate judge denied Lawson's request for the appointment of a psychiatric expert because Lawson had "failed to show the necessity" for the appointment. *Lawson v. Dixon*, No. C–88–738–S, slip op. at 7 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge). After reviewing the supporting affidavit of the psychiatrist Lawson asked the court to appoint, the magistrate judge held that Lawson was not entitled to relief or to an evidentiary hearing on his appointment motion. *See id.*

III

Lawson now assigns error to three aspects of the district court's denial of his motion for appointment of a psychiatric expert. First, he contends that the magistrate judge erred by failing to hold *ex parte* proceedings to adjudicate his motion. Second, he urges that the court applied incorrect legal standards in deciding the motion. Third, he argues that the court's conclusions of fact are not fairly supported by the record as a whole. We address these contentions seriatim.

A

By far the thorniest issue the instant appeal presents is Lawson's claim that the district court's judgment should be reversed because the magistrate judge failed to hold an *ex parte* proceeding to adjudicate his appointment motion. The question is one of law; we therefore review the decision below *de novo*. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 508 & n. 27, 104 S.Ct. 1949, 1959, 1964 & n. 27, 80 L.Ed.2d 502 (1984).

[1] Lawson's motion clearly invoked both 18 U.S.C. § 3006A(e) and 21 U.S.C. §§ 848(q)(4)(B) and (q)(9) as alternative grounds for the appointment of a psychiatric expert. These statutes provide that the district courts may appoint counsel and other experts to assist criminal defendants in judicial proceedings under certain circumstances. The principal difference between the Title 18 and Title 21 provisions lies in the litigative postures under which they afford defendants expert assistance.

18 U.S.C. § 3006A(e) provides in relevant part:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e)(1). Thus, defendants who wish to have the assistance of experts at trial or in collateral-attack proceedings may apply for government funds to pay the cost of employing such experts pursuant to section 3006A(e)(1). If the district court or magistrate judge assigned to the case finds that the defendant cannot obtain the desired services on the strength of his own purse, the court must authorize the defendant's counsel to seek and employ such experts as are "necessary" to the defense. Therefore, appointment of an expert for purposes of mounting a defense at trial is mandatory under Title 18 if the defendant satisfies the statutory prerequisites of indigence and necessity.

[2] By contrast, 21 U.S.C. § 848(q)(4)(B) and (q)(9), read together, provide counsel and expert services only in the context of post-conviction collateral attacks upon the validity of prior federal- and state-court convictions and sentences. Specifically, the Anti–Drug Abuse Act of 1988, Pub.L. No. 100–690, § 7001(b), 102 Stat. 4181, 4193–94 (1989), amended section 408 of the Controlled Substances Act, 21 U.S.C. § 848, to provide counsel and ancillary support to certain defendants seeking to challenge a sentence of death in post-conviction proceedings under sections 2254 or 2255 of Title 28. The relevant portions of section 848(q)(4)(B) of Title 21 now state that

> [i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraph[ ] ... (9).

21 U.S.C. § 848(q)(4)(B). Paragraph (9) of this subsection provides that

> [u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore [sic]. ...

21 U.S.C. § 848(q)(9). By the terms of the statute, Congress mandated the application of federal funds for legal representation of habeas corpus petitioners as well as investigative, expert, and other services, provided the prisoner[5] can demonstrate that he is financially unable to secure the assistance on his own and that such assistance is "reasonably necessary" for his representation.

[3] Whether a district court's failure to hold "ex parte proceedings" in order to adjudicate an appointment motion under 21 U.S.C. § 848(q)(9) constitutes reversible error is, so far as we are able to determine, a question of first impression in the federal courts. The few cases that have arisen under the statute since its enactment have dealt exclusively with the merits of such appointments. *See, e.g., In re Lindsey*, 875 F.2d 1502, 1505–08 (11th Cir.1989) (per curiam). This paucity of authority is hardly surprising; the clear purpose of the statute is to provide counsel and experts for the assistance of habeas corpus petitioners, not to require the holding of *ex parte* proceedings for their own sake.

Yet it is equally plain that the statute contemplates *ex parte* proceedings as the proper device for adjudicating appointment motions. We observe that 18 U.S.C. § 3006A(e), the analogous appointment provision of the Criminal Justice Act, has been interpreted as virtually guaranteeing that decisions on expert-appointment motions will be made, as that statute requires, "after appropriate inquiry in an ex parte proceeding." 18 U.S.C. § 3006A(e)(1). *See United States v. Chavis*, 476 F.2d 1137, 1141–42 (D.C.Cir. 1973) (stating that "[a] defendant's indigency [sic] and need for assistance under § 3006A is to be determined by an *ex parte* proceeding"); *United States v. Hamlet*, 456 F.2d 1284, 1285 (5th Cir.1972) (per curiam) (holding that "the trial court erred in denying the § 3006A motion without conducting the ex parte inquiry required by the statute"); *United States v. Theriault*, 440 F.2d 713, 715 (5th Cir.1971) (same). We agree without hesitation that *ex parte* proceedings are the only proper means of adjudicating appointment motions contemplated by the language of both the Title 18 and Title 21 statutes. The plain language of section 848(q)(9) should not, therefore, be overlooked simply because (for example) the court prefers all such motions to be handled on the record.

5. In the absence of any meaningful legislative history of 21 U.S.C. §§ 848(q)(4)(B) and (q)(9), some might argue that the statute's counsel and expert-services provisions were intended to apply only to those federal death sentences imposed under the Anti–Drug Abuse Act, *see* 21 U.S.C. § 848(e), and not to state death-penalty cases under federal habeas corpus review. Such an interpretation would, in our view, fly in the face of the statute's plain meaning. Because death sentences imposed under the Act will be handed down by federal courts for federal crimes, only one of the statutory predicates for section 848(q)(4)(B)—28 U.S.C. § 2255—would ever be used. Of course, 28 U.S.C. § 2254 is the primary vehicle by which state prisoners challenge state criminal judgments in federal court. We believe that by referring to section 2254, Congress clearly intended to create a counsel and expert-services guarantee in federal habeas review of state-imposed death sentences as well.

In this case, however, certain countervailing considerations are present. This matter already had assumed an advanced procedural posture when it came before the district court for decision. The respondent had waived the exhaustion requirement unconditionally with respect to all the claims in Lawson's habeas petition. The court was concerned that Lawson's motion for the appointment of an expert might result in an expansion of his mental-health claims beyond their scope in the habeas petition, and that the respondent would then move to dismiss the petition as "mixed" under *Rose v. Lundy*. Desiring to avoid the waste of judicial resources such a scenario would entail, the magistrate judge moved *sua sponte* to hold a hearing at which the effect of the expert's assistance on Lawson's habeas claims could be ascertained.

Under these circumstances, we hold that the magistrate judge's failure to adjudicate Lawson's motion "in an ex parte proceeding," 18 U.S.C. § 3006A(e)(1), or "in ex parte proceedings," 21 U.S.C. § 848(q)(9), was not reversible error. The court's action was a justifiable attempt to ensure that the factual allegations supporting Lawson's petition had been "fairly presented" to the state courts prior to federal habeas corpus review. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Because

> it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation[,]

federal courts apply the doctrine of comity, which

> teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Darr v. Burford, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950); *see also Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982) (same); *Duckworth v. Serrano*, 454 U.S. 1, 2, 102 S.Ct. 18, 18, 70 L.Ed.2d 1 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Where petitions for the Great Writ brought pursuant to 28 U.S.C. § 2254 are concerned, the responsibility for "rigorously enforcing [the] total exhaustion rule," *Rose*, 455 U.S. at 518, 102 S.Ct. at 1203, and thereby preserving comity between the federal and state judicial systems, necessarily falls upon the shoulders of the federal court with jurisdiction of the petition. Therefore, we conclude that it was proper for the magistrate judge to hold a hearing *sua sponte* to consider the exhaustion question presented by Lawson's motion. We emphasize that this holding, which effectively creates a narrow exception to the "ex parte proceeding" requirements of 18 U.S.C. § 3006A(e)(1) and 21 U.S.C. § 848(q)(9), is limited to motions made *sua sponte* by the district court for the purpose of ascertaining whether, and ensuring that, the petitioner's claims have been totally exhausted by a state tribunal when the State has waived exhaustion voluntarily.[6]

[4] In the alternative, Lawson contends that the magistrate judge erred by failing to hold an *ex parte* evidentiary hearing at which his appointment motion could be adjudicated. Because the predicate statutes do not require the holding of a hearing, we reject this contention. 21 U.S.C. § 848(q)(9) and 18 U.S.C. § 3006A(e)(1) speak merely of "proceeding(s)" to be conducted *ex parte*. Following the holding of the *sua sponte* hearing, the magistrate judge offered Lawson the opportunity to answer the respondent's motion to dismiss his petition with written justifications for his request that a psychiatric expert be appointed. The magistrate judge's recommended findings of fact and conclusions of law amply reflect the care with which the court considered Lawson's arguments on this point. The purpose of the statute's "proceeding" requirement is to ensure that the petitioner's motion is carefully examined by the court, not to force the holding of formal hearings for their own sake. Therefore, we conclude that the magistrate judge did not err by failing to hold a hearing on the merits of his appointment motion.

6. Thus, we anticipate that, where the State has entered no waiver of exhaustion, district courts will continue to hold the *ex parte* proceedings required by the appointment statutes, and will, in the concealed venue of such proceedings, inform petitioners deemed to be raising new and unexhausted habeas claims that their petitions will be dismissed pursuant to *Rose v. Lundy* absent the bringing of additional state-court proceedings to exhaust the new claims.

B

We now consider Lawson's contention that the district court erred by applying the incorrect legal standard in adjudicating his appointment motion.

[5] Both 18 U.S.C. § 3006A(e)(1) and 21 U.S.C. §§ 848(q)(9) require (1) that the habeas petitioner be financially unable to obtain the requested expert services on his own, and (2) that such services be "necessary" (18 U.S.C. § 3006A(e)(1)) or "reasonably necessary" (21 U.S.C. § 848(q)(9)) for the defendant's representation. Neither party contests Lawson's indigence. The only question, therefore, is whether expert services are "necessary" or "reasonably necessary" for Lawson's prosecution of the mental-competency claims in his habeas petition.

Lawson moved for the appointment of an expert psychiatrist after filing his habeas petition. Thus, he cannot assert that the psychiatrist's services were necessary to help prepare the claims in his pleading. Lawson proffered the affidavit of Dr. Billy Royal, the psychiatrist he asked the court to appoint, which stated that Dr. Royal already had formed his opinion on Lawson's alleged lack of competency and inability to waive his right to a sentencing hearing. Dr. Royal apparently requested further study on the issue of the presence of psychological mitigating evidence, although he opined tentatively in that area as well. Thus, it appears that Lawson already had marshalled the evidence he wished Dr. Royal to expound upon.

To determine whether Dr. Royal's appointment was "reasonably necessary," the district court had to decide whether the record, viewed in the light of Dr. Royal's forecasted evidence, required an evidentiary hearing in order to resolve the mental-competency claims in Lawson's habeas petition. Obviously, there was no need to appoint Dr. Royal if Lawson's petition raised no claims entitling him to a hearing at which the psychiatrist could present evidence of Lawson's competence. For the reasons stated in part IV, *infra*, we conclude that Lawson was not entitled to an evidentiary hearing on the claims presented in his habeas petition. We therefore hold that there was no "reasonable necessity" for Dr. Royal's appointment.

C

Finally, Lawson argues that the district court's factual analysis of his motion was clearly erroneous and not fairly supported by the record. For the reasons set forth in the magistrate judge's recommended findings of fact and conclusions of law, *see Lawson v. Dixon*, No. C–88–738–S, slip op. at 35–61 (M.D.N.C. Aug. 19, 1991) (order and recommendation of United States Magistrate Judge), we disagree. After carefully comparing Lawson's motion and accompanying affidavit with the relevant portions of the state-court record, we are not left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Accordingly, we hold that the district court did not clearly err in analyzing Lawson's factual assertions with respect to his appointment motion.

IV

In his second argument for reversal, Lawson contends that the magistrate judge erred in denying his motion for an evidentiary hearing on the four mental-health claims presented in his petition for the writ because the claims contained allegations not subjected to factual development in the state courts.

[6, 7] A habeas petitioner is not entitled to an evidentiary hearing on mental-competency claims in his habeas petition unless he presents clear and convincing evidence that creates a real, substantial, and legitimate doubt with respect to the petitioner's mental capacity and ability to assist his counsel at

trial. Such evidence must be both positive and unequivocal. *See, e.g., Adams v. Wainwright*, 764 F.2d 1356, 1360 (11th Cir.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). In order to meet this standard, we agree with the Fifth Circuit Court of Appeals that the petitioner must present "a history of mental illness, [or] substantial evidence of mental incompetence at or near the time of the trial supported by the opinions of qualified physicians and the testimony of laymen." *Flugence v. Butler*, 848 F.2d 77, 79 (5th Cir.1988). Should the petitioner clear this lofty hurdle, an evidentiary hearing will be convened at which he may prove his incompetence at the time of trial by a preponderance of the evidence.

For the reasons set forth in the magistrate judge's recommended findings of fact and conclusions of law, *see Lawson v. Dixon*, No. C–88–738–S, slip op. at 35–61 (M.D.N.C. Nov. 19, 1991) (order and recommendation of United States Magistrate Judge), we agree with the district court that Lawson has failed to present clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to his mental capacity. Accordingly, we affirm the district court's decision not to accord Lawson an evidentiary hearing on the psychological claims presented by his habeas petition.

V

Lawson also assigns error to three matters arising from the guilt-innocence and penalty phases of his trial. First, he contends that there is a reasonable likelihood that the penalty-phase jury instructions unconstitutionally required the jurors unanimously to find and consider mitigating evidence. Second, he argues that the jury instruction on the offense of first-degree murder created a presumption of malice and thereby denied him due process of law. Third, he urges that prosecutorial misconduct so infected the trial as to deny him due process of law and to render the sentencing determination unreliable. The district court declined to issue the writ on any of these grounds. Because we have rejected precisely these contentions in previous decisions, we find them meritless in the instant case.

A

[8] In instructing the jury with respect to the weighing of aggravating circumstances against mitigating circumstances during the penalty phase of Lawson's trial, the superior court stated:

> [The issue is] do you find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg [sic] any mitigating circumstance or circumstances found by you.

Lawson attacks these jury instructions on the ground that they prevented the jury from considering mitigating evidence unless all twelve jurors agreed on the existence of a particular mitigating circumstance. He claims that the instructions in this respect violated the rules established in *Mills v. Maryland*, 486 U.S. 367, 384, 108 S.Ct. 1860, 1870, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 442, 110 S.Ct. 1227, 1233, 108 L.Ed.2d 369 (1990).

In *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1211, 117 L.Ed.2d 450 (1992), this court examined a North Carolina jury instruction identical to that under review here. *Id.* at 419. We held that such an instruction "does not run afoul of *Mills/McKoy*" because it does not state that jurors must "agree unanimously" on the existence of a mitigating factor. *Id.* The question having been thus decided by a panel of this tribunal, we reject Lawson's argument without further discussion.

B

[9] During the jury charge at the guilt-innocence phase of Lawson's trial, the superior court instructed the jury that malice is

> that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which approximately [sic] results in death.

The superior court then instructed the jury with respect to first-degree murder that

> if the State proves beyond a reasonable doubt that the defendant intentionally killed ... Wayne Shinn with a deadly weapon that approximately [sic] caused his death, the law implies first, that the killing was unlawful, and second, that it was done with malice.

Lawson contends that this instruction was improper because it informed the jury that the law "implies," rather than allows, the drawing of an inference that malice existed. In *Rook v. Rice*, 783 F.2d 401 (4th Cir.), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), and *Davis v. Allsbrooks*, 778 F.2d 168 (4th Cir.1985), this court considered North Carolina jury instructions identical to those under review here. In both cases we held that the instruction merely shifted the burden of production on the malice element of the crime to the defendant, but did not shift the ultimate burden of proof to him. *See Rook*, 783 F.2d at 405; *Davis*, 778 F.2d at 172–74. In light of our holdings in *Rook* and *Davis*, therefore, we reject Lawson's contention without further discussion.

C

[10] During summation at the guilt phase of Lawson's trial, the prosecutor argued to the jury that the victim's house was not his castle but his "crucifixion block." The prosecutor also argued that it was "sickening to me to think that defendants are tried in the beautiful courtroom like this." The prosecutor further stated that Lawson's constitutional rights should be compared with those of the victims, noting that Buren Shinn "had no attorney sitting next to him." He also urged that in other countries, after being convicted of first-degree murder, authorities would bring a rope and hang the defendant summarily. Lawson contends that these arguments so infected his trial as to render it fundamentally unfair, and that he therefore is entitled to the writ.

In *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), the Supreme Court reiterated that the standard in habeas cases for assessing improper prosecutorial comment is, as initially enunciated in *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), whether the proceeding at issue was rendered fundamentally unfair by the improper argument. *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471; *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. This standard is the same for both the prosecution's guilt-innocence and penalty phase arguments. *E.g., Adams v. Aiken*, 965 F.2d 1306, 1320 (4th Cir.1992), *cert. denied sub nom. Adams v. Evatt*, — U.S. —, 113 S.Ct. 2966, 125 L.Ed.2d 666 (1993); *Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir.1990), *cert. denied*, — U.S. —, 112 S.Ct. 14, 115 L.Ed.2d 1098 (1991). In determining whether a prosecutor's comments denied the defendant fundamental fairness, the Supreme Court has emphasized the necessity of looking to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated. *Darden*, 477 U.S. at 182, 106 S.Ct. at 2472; *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873.

Here the evidence of Lawson's guilt was overwhelming. The prosecutor's comments, while excessive and needlessly inflammatory, were relatively isolated. Viewing the comments in light of the superior court's accurate instructions to the jury on the elements of the crimes charged and the heavy quantum of proof necessary to convict the defendant of their commission, we hold that the State's closing arguments did not deprive Lawson of due process.

VI

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

KEY NUMBER SYSTEM

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 26, 1993

No. 92-4003

CA-88-738-S

DAVID LAWSON

Petitioner - Appellant

v.

GARY DIXON, Warden, Central Prison, Raleigh, North Carolina

Respondent - Appellee

No. 92-4004
CA-88-738-S

DAVID LAWSON

Petitioner - Appellant

v.

GARY DIXON, Warden, Central Prison, Raleigh, North Carolina

Respondent - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
SALISBURY DIVISION

FILED
NOV 19 1991
Clerk, U. S. District Court
Middle District of N. C.

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, WARDEN,
Central Prison,
Raleigh, North Carolina,

Respondent.

C-88-738-S

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, seeks relief pursuant to 28 U.S.C. § 2254. Petitioner alleges that his conviction and sentence are unconstitutional. He requests an evidentiary hearing and the appointment of a psychiatrist to further examine him with respect to his claims of mental incompetency at the time of his state trial. The unusual procedural nature of the case presents a number of thorny issues in addition to the merits of the petition.

A. Procedural History and Issues Before the Court

Petitioner was tried and convicted at the June 1, 1981 criminal session of Superior Court in Cabarrus County, North Carolina, for the charges of first-degree murder, burglary and felonious assault. The house of Wayne Shinn was burglarized and he was murdered when he investigated the break in. Shinn's father Buren was hunted down and shot to eliminate him as a witness but he survived. The jury recommended the penalty of death for the first-degree murder charge and such sentence was entered. In addition, petitioner was sentenced to twenty years imprisonment for the assault with a deadly weapon with intent to kill Buren Shinn, which was to run consecutive with the first-degree murder sentence if, for any reason, a penalty of less than death were entered. Petitioner was given a ten-year sentence for the felonious breaking or entering charge which was set to run at the expiration of the assault with a deadly weapon conviction.

Petitioner appealed his conviction and it was affirmed by the North Carolina Supreme Court on April 30, 1984. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984). The United States Supreme Court denied certiorari on May 20, 1985. Lawson v. North Carolina, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

Petitioner filed a motion for appropriate relief in Cabarrus County Superior Court on February 11, 1986. The petition was amended on May 8 and May 21, 1987. One of petitioner's present counsel, Harry H. Harkins of the Orange County Bar, represented petitioner at that time. A hearing was held on May 26, 1987 and an order was entered denying relief on July 1, 1987. Both the North Carolina Supreme Court and the United States Supreme Court denied certiorari. State v. Lawson, 322 N.C. 114, 367 S.E.2d 919 (1988), and Lawson v. North Carolina, 485 U.S. 1016, 108 S.Ct. 1494, 99 L.Ed.2d 883 (1988).

On April 14, 1988, petitioner filed, in this Court, a motion to stay his execution, pending disposition of the petition for writ of certiorari by the United States Supreme Court, to give him time to file a petition for writ of habeas corpus. The motion was

granted and petitioner was given sixty days to file the petition. Petitioner's counsel employed the resources of the North Carolina Death Penalty Resource Center. Petitioner requested and received a thirty-day extension of time.

The petition for a writ of habeas corpus in this Court raises numerous grounds, most of which have not been previously presented to the state courts. Therefore, petitioner also filed a motion to hold proceedings in abeyance pending resolution of a new, contemporaneously filed, state post-conviction motion. Respondent opposed that motion. Respondent requested the Court only adjudicate the exhausted claims or if the unexhausted claims were considered, use only the present record. The Court denied both petitioner's motion and respondent's request. It found that Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), prohibited ruling on a mixed petition of both exhausted and unexhausted claims. It further concluded that a stay of a mixed petition was also unwarranted. A limited stay of thirty days was granted to permit the petitioner to pursue the state post-conviction relief and obtain a stay of execution from that court.

Thereafter, respondent moved to alter or amend the judgment pursuant to either Fed. R. Civ. P. 59(e) or ~~60~~. Respondent was directed to specifically clarify the premises of certain issues raised in the motion. Respondent replied that if he was permitted to answer, the state would unconditionally waive exhaustion on all unexhausted claims in the petition. In granting the motion, the

Court emphasized the understanding that if respondent were permitted to answer, the state would unconditionally waive the exhaustion requirement with respect to unexhausted claims, but would be permitted to preserve, for appeal purposes, the Court's previous denial of its request that the Court only proceed and adjudicate petitioner's exhausted claims or that the Court only consider unexhausted claims limited by the present record which had been developed during the direct appeal and first post-conviction motion for appropriate relief.

Based on respondent's assurance that he would unconditionally waive exhaustion of non-exhausted claims, the Court found no need to dismiss the petition. It granted respondent's motion and vacated the prior dismissal of this action. Respondent filed an answer wherein he explicitly waived the exhaustion requirement as to the unexhausted claims.

Thereafter, petitioner filed an ex parte motion for funds for the appointment of a psychiatric expert. On April 4, 1989, a hearing was held to determine the further progress of the petition. Petitioner was required to reveal to respondent the basis for his motion to obtain funds for the appointment of a psychiatric expert. After the hearing, the Court required petitioner to brief and identify those claims for which an evidentiary hearing was requested. Respondent replied with a motion to dismiss the petition in its entirety based on petitioner's bad faith.

Respondent's motion to dismiss contends that petitioner's motion for the appointment of a psychiatric expert (to be used at

an evidentiary hearing in support of the claim that petitioner was incompetent to proceed at his trial) so altered the petitioner's claims that it, in essence, raised a new claim. And this new claim has not been exhausted and, therefore, should be dismissed pursuant to Rose v. Lundy. Soon thereafter, petitioner moved to defer further proceedings until he could seek state court relief in light of the United States Supreme Court decision in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The stay was granted.

After the North Carolina Supreme Court denied petitioner relief, this case was again activated on the Court's docket. In the meantime, respondent requested and was granted permission to amend his answer in order to object to any of petitioner's claims which are based on an attempted retroactive application of a new rule of constitutional law and, therefore, prohibited by Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The Court directed that the parties submit additional briefing on this issue as well as the issue of procedural default. It directed petitioner to set out all transcript citations for his claims. Finally, the Court converted respondent's answer and implicit motion to dismiss to a motion to dismiss and for summary judgment, notified the parties and ordered further briefing.

B. Issues Before the Court

Petitioner has moved for permission to conduct discovery pursuant to the Federal Rules of Civil Procedure and for an

evidentiary hearing on numerous claims. (Plead. No. 36) In addition, petitioner requests the appointment of a psychiatrist to help him further investigate his claim that he was incompetent at the time of his trial. (Plead. No. 34) Respondent claims that the introduction of new evidence in the form of an expert psychological opinion amounts to asserting a new claim. He contends he has not unconditionally waived exhaustion as to this new claim. Therefore, he argues that the petition now contains both exhausted and unexhausted claims and must be dismissed.

Respondent further contends that a number of claims must be dismissed as seeking to advance a new rule of constitutional law in a collateral proceeding contrary to the mandates of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Finally, respondent asserts that many of the claims should be dismissed for petitioner having failed to comply with North Carolina procedural requirements as to them.

Petitioner's general request for discovery will be denied. Rule 6, Rules Governing Section 2254 Cases, requires that any request for discovery be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, which are sought to be produced. Furthermore, discovery may only be granted upon good cause shown. In the instant case, petitioner has not identified the discovery nor shown good cause nor does the Court independently perceive any need. Therefore, that request shall be denied.

Petitioner's request for the appointment of a psychiatric expert pursuant to 18 U.S.C. § 3006A(e)(1) shall be denied as well. Requests for expert psychiatric assistance should be granted if the person is indigent and the Court finds the services to be necessary. See Jones v. Murray, ____ F.2d _____ n.4 (4th Cir. 1991). In the instant case, petitioner requests the appointment of a psychiatric expert to help him investigate his claim that he was incompetent at the time of his trial. Petitioner fails to show a necessity therefor. Petitioner has submitted an affidavit from his expert indicating the nature of the opinion which would be forthcoming. Accepting the opinion for purposes of this decision, the Court has reviewed the competency issue and finds that petitioner is not entitled to either relief or an evidentiary hearing and, therefore, a psychiatric or psychological expert need not be appointed.

Petitioner also requests an evidentiary hearing and sets out those claims for which a hearing is requested. The Court has accepted petitioner's facts as alleged and, nevertheless, finds that either he is not entitled to relief or the claim is barred. Therefore, his request for an evidentiary hearing shall be denied as well.

Respondent requests that certain claims be dismissed because they seek to assert a new constitutional rule or apply a new rule established subsequent to petitioner's conviction being final. Respondent has identified those claims. The Court will discuss its ruling on this issue as each claim is reviewed.

Finally, respondent moves to dismiss, on the grounds of procedural default, all claims which petitioner failed to raise either on direct appeal or in a motion for appropriate relief before the state court. Because this might obviate a review of the petition on the merits, the Court will discuss this issue presently. But first it will consider respondent's motion to dismiss because petitioner has allegedly raised a new, unexhausted claim.

B.(1) Respondent's Motion to Dismiss Petition for Non-Exhaustion

In respondent's motion to dismiss, he contends that as a result of petitioner's request for the appointment of a psychiatric expert and the affidavits in support thereof, petitioner has essentially raised a new claim not previously presented. This allegedly constitutes a significant alteration of petitioner's claims and justifies the instant motion to dismiss for non-exhaustion.

Petitioner retorts that Dr. Royal's affidavit merely provides an expert opinion for the same facts and allegations contained in the petition and, therefore, does not constitute a significant alteration of the mental health claims presented to the Court. In addition, petitioner asserts that the state's position is not reasonable. Petitioner points out that when the petition was first filed, the Court dismissed it for lack of exhaustion of state court remedies. In so doing, the Court rejected respondent's request to limit its review to those claims which were exhausted in state court. The state thereafter unconditionally waived exhaustion.

Petitioner argues that in so doing, respondent necessarily must have known that the federal district court would not be bound by an inadequately developed state court record and, therefore, must have anticipated that the mental health claims would be bolstered by expert evidence because of the very nature of those claims. Furthermore, the state should have known that when it voluntarily waived exhaustion, it took a risk that any claim not adequately developed below would have to be developed in federal court.

Petitioner further opposes respondent's motion to dismiss because he withdrew his second motion for appropriate relief in state court in reliance on respondent's unconditional waiver of exhaustion of state court remedies. Petitioner suggests that he does not have a further remedy in state court and that he should not suffer prejudice for his reliance on the state's tactical choice made many months ago.[1]

The Court will first turn its attention to whether the affidavit presented by Dr. Royal in support of petitioner's motion for the appointment of an expert witness and examiner constitutes a significant alteration in petitioner's claims so as to present,

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[1]Petitioner contends that he withdrew his motion for appropriate relief after being invited to do so in the Court's September 21, 1988 Order. Petitioner's July 14, 1989 Reply at 15. However, that Order did not contain an invitation. Rather petitioner infers one based on his own set of expectations. The Court merely stated that because the state would unconditionally waive the exhaustion requirement, the Court saw no need to dismiss the petition or to entertain a stay of proceedings while petitioner litigated the matter in state court. It added as an aside, emphasizing the lack of need to dismiss or stay, that petitioner could well decide to dismiss the state court petition. This clearly was not an invitation, but rather a discussion of a possible factual scenario which persuaded the Court to reject the alternatives of dismissal or stay as suggested by the parties and to simply let the matter proceed in federal court under respondent's unconditional waiver of the exhaustion requirement.

in essence, a new claim for relief. Respondent admits that the petition contains allegations that petitioner was not competent to be sentenced, not competent to waive his right to a reliable sentencing determination, that the court should have conducted a hearing, and that counsel's failure to consider and present mental health mitigation evidence violated petitioner's rights as well. However, respondent argues that none of the claims mention that their factual basis will be the psychiatric affidavit evidence of Dr. Royal. Nor was there an indication that petitioner would seek to expand the record either. Respondent acknowledges that petitioner did make a general request for an evidentiary hearing. He emphasizes that petitioner did not reveal, as a basis for the hearing, the affidavit of Dr. Royal, but rather, merely said that the previous hearing in state court was not full and fair. Respondent argues that as a consequence, it was reasonable for him to assume that petitioner was only relying on the facts already in the record to support his claim.

Petitioner, of course, argues to the contrary. He claims respondent should have been aware that if the Court found the state court hearing not to be full and fair, then a federal hearing might well be required, and a new hearing was especially likely when, as here, there was no state court hearing on the issue.

Dr. Royal's affidavit reveals that he specializes in the practice of psychiatry. (Pleading 35) He was recently asked to provide an opinion on petitioner's competency at the June, 1981 sentencing and to evaluate the presence of a mental health

mitigation defense as an issue for post-conviction proceedings. He held several interviews with petitioner and reviewed petitioner's pretrial psychiatric evaluation. In his opinion, the pretrial evaluation was deficient for failing to develop or assess social or developmental history to support the psychiatric findings and did not attempt to "understand the psychological person that David Lawson was . . . ." He opines that petitioner was not competent to proceed with the sentencing because of petitioner's mental health problems and the stress of the trial. He asserts that petitioner was not capable of assisting his attorney in the preparation and presentation of evidence or in appreciating the nature of the sentencing process.

Dr. Royal bases his opinion on his conclusion that petitioner has a low self-image and self-esteem which results in self-destructive behavior, stemming in part from his abandonment by his parents, the behavioral problems with his mother and step-father leading to his placement in an adolescent correctional center, and from his not being welcome at his home. He further opines that petitioner has fear of rejection and a macho view of the world. Dr. Royal reveals that petitioner, who was essentially on his own since the age of fifteen, tried to re-establish a relationship with his natural father which did not work out as expected. Petitioner fathered a daughter and when the relationship with the woman ended, he attempted suicide.

According to Dr. Royal, these facts explain petitioner's inability to control his behavior and lack of capacity to

understand options at trial and in particular, at sentencing. He states that even at sentencing petitioner could not comprehend any information given to him on a rational, objective basis and that the pathology of self-destructive behavior, macho image, depression and emotional turmoil at the time resulted in petitioner "making his rather bizarre decisions at the time of the penalty phase." In addition, he states that the same factors played a role in petitioner's behavior at the time of offense and that there is evidence that the use of drugs at the time of offense could have impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. He further states that further contact and evaluation with petitioner is necessary to better understand the ideology and development of the pathology.

The Court will first examine whether this affidavit by Dr. Royal should be viewed as a new claim which has not been exhausted. Thereafter, the Court will explore what effect, if any, respondent's waiver of exhaustion should have if the claim is found to be a new one.

The exhaustion requirement is not jurisdictional but involves matters of comity between federal and state court systems. Landano v. Rafferty, 897 F.2d 661, 668 (3d Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990). It must be strictly construed, not just to preserve harmony between our dual judicial systems but to increase a likelihood that factual allegations will be fully developed in state courts prior to federal court habeas

corpus review. Id. In order to demonstrate compliance with the exhaustion requirement, a petitioner must show that he has fairly presented his claims to the state courts. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). "[F]airly presented" has been defined as being when the federal claim is the substantial equivalent to the state claim. Picard v. Connor, 404 U.S. at 278.

A claim is substantially equivalent only when the state court has been presented with the same factual and legal claims relied upon in the petition. Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982). Under this analysis, a new factual basis to support a claim, not just a new legal theory, constitutes non-compliance with the exhaustion requirement. Oftentimes, it may be difficult to determine whether a particular new fact will constitute additional evidence which will require exhaustion in state court. The Fourth Circuit indicates that not all bits of new evidence will create a new claim. Rather, only those bits of "critical evidence" which make the evidentiary basis for the case significantly different and stronger. Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, 1033 (4th Cir. 1988).

What constitutes "critical evidence" may not always be easy to ascertain. However, several courts have fleshed out some considerations. In Landano v. Rafferty, 897 F.2d 661, and Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, the courts found a new claim when new facts were used to support a Brady violation (see United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87

L.Ed.2d 481 (1985)). In Landano, the court found that the mere identification of Brady claims in the state post-conviction petition did not comprehend any additional Brady claims based on entirely different facts. And in Wise, even though the petitioner had already identified the witnesses' agreement in state proceedings, when he obtained factual support of the existence of such agreement, this new proof of the factual claim was critical evidence which, therefore, significantly altered the posture of the claim sufficiently to amount to a new claim.

The Sixth Circuit has also entered into the foray of what constitutes a new factual claim in Sampson v. Love, 782 F.2d 53 (6th Cir.), cert. denied, 479 U.S. 844, 107 S.Ct. 159, 93 L.Ed.2d 98 (1986). There, the petitioner attempted to introduce an affidavit of jury vindictiveness. The prior claim amounted to speculation of the same, based on a mere inference. The court found the new fact put the case in a significantly different posture and constituted a new claim.

Petitioner cites the Supreme Court's decision in Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), in support of his position. There, the Supreme Court held that the habeas petitioner did not circumvent the exhaustion requirement when the district court, pursuant to Rule 7(b) of the Rules Governing Section 2254 Actions, directed the parties to present supplemental evidence consisting of affidavits and a computer analysis of the mathematical possibility that the exclusion of blacks from the grand jury may have been due to chance or accident.

The Supreme Court noted that such evidence is the normal type of proof in discrimination claims and added nothing to the case not considered intrinsic in the consideration of such claims. Vasquez v. Hillery, 474 U.S. at 259. Petitioner argues here that expert psychiatric evidence in this case is also normal and intrinsic to competency claims. See Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Petitioner's argument is not without merit. However, Vasquez cannot be stretched to cover petitioner's case. The Supreme Court decision did not rest solely on the fact that statistical evidence was intrinsic to grand jury discrimination cases. The Court relied on the additional fact that it was the district court itself which expanded the evidentiary record. Vasquez v. Hillery, 474 U.S. at 258. The court in Aiken v. Spalding, 841 F.2d 881, 884 n.3 (9th Cir. 1988), found this distinction to be crucial in facing a similar situation.

In Aiken, whether petitioner made a request for counsel became a crucial issue. The petitioner wished to submit an expert opinion considering the decibel level of petitioner's request for counsel recorded on audiotape. This would show that the request was at a level consistent with other requests to which the officers did respond. It would not prove that the officers heard the request for counsel, but merely that such request could be heard. Nevertheless, the court found this new proof created a new, unexhausted claim. It distinguished Vasquez v. Hillery, 474 U.S. 254, noting that in its case it was the petitioner, not the

district court, who intended to expand the record. It found this distinction to be crucial even though the petitioner only wished to present an expert opinion concerning facts already before the state court. That is the same situation facing this Court.

From these cases, one is left with a firm impression that most new facts that are important to a claim constitute "critical evidence."[2] And it makes no difference that the new facts are only expert opinions relating to facts already in the record. Petitioner's attempt to expand his mental competency claims with a new opinion from an expert witness constitutes a significantly different claim of critical factual evidence which would attempt to markedly improve the posture of petitioner's claim. This would be the first evidence from any expert indicating possible mental incompetency. It is a new claim.

Notwithstanding the finding that petitioner is attempting to present new, critical evidence in support of his claim, that does not end the matter. The instant case is different from other cases because of its peculiar procedural posture. Here, respondent unconditionally waived exhaustion as to this very claim. The Court finds this additional factor is sufficiently significant to alter the general rule prohibiting the presentation of new critical evidence without exhaustion of such factual claims in state court.

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[2] But see Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991). There, in a capital murder case, petitioner sought to introduce, in federal court, additional facts about his childhood in support of a claim that he should have been permitted to introduce non-statutory mitigating factors. The court found that the additional introduction of facts concerning defendant's childhood, which could include both favorable and unfavorable evidence, did not involve sandbagging by the petitioner in order to introduce an entirely new claim in federal court but merely served to present additional facts.

As stated previously, exhaustion is not a jurisdictional requirement, but rather arises from interests of comity between state and federal courts. Landano v. Rafferty, 897 F.2d at 668. In fact, it is discretionary with appellate courts. Granberry v. Greer, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987). Because exhaustion is not jurisdictional, the state may waive exhaustion. Id. However, the waiver must be unconditional. Id.; Sweezy v. Garrison, 694 F.2d 331 (4th Cir. 1982), cert. denied, 461 U.S. 908, 103 S.Ct. 1882, 76 L.Ed.2d 812 (1983). Not only are conditional waivers of exhaustion prohibited, but in addition, the Court may not allow the state to engage in conduct that amounts to a conditional waiver. Stamper v. Baskerville, 724 F.2d 1106 (4th Cir. 1984). In Stamper, the state waived exhaustion as to claims only after the district court ruled that the claims would be dismissed on the merits. (Case was remanded to require district court to dismiss both exhausted and unexhausted claims.)

In the instant case, petitioner complains that the state should not be permitted to retract its unconditional waiver of exhaustion when it finally learns that petitioner may introduce additional proof in support of a factual allegation of incompetency. The Court agrees for several reasons.

First, respondent knew or should have known that the Court would not restrict its review of petitioner's claim to the record before the state courts. As petitioner points out in his brief, the state had previously sought to limit the Court's consideration of the petition to the record previously developed in state court.

However, this was rejected. Thus, the state knew there was the possibility of a hearing on the competency issue.

Second, petitioner requests an evidentiary hearing on other issues as well. But respondent has not made a motion to dismiss for failure of exhaustion of remedies as to those claims. Thus, in petitioner's memorandum in support of his motion for an evidentiary hearing (pleading 36), petitioner requests a hearing on jury instructions so that he can present a linguistic expert concerning what a reasonable jury understands from the jury instructions. Petitioner requests a hearing concerning the waiver of his rights, including the right to counsel at the sentencing hearing. Petitioner wishes to present evidence on ineffective assistance of counsel and the change of venue record which he claims was not sufficiently developed. Petitioner requests an opportunity to present statistical evidence concerning the unconstitutionality of the death penalty as imposed in Cabarrus County. Finally, petitioner seeks an evidentiary hearing to look into the absences of petitioner at the trial proceedings.

All of these claims contemplate additional evidence and facts, including an expert opinion, if the motion is granted. The Court can see no difference between petitioner's request for a hearing as to these issues as opposed to his request for a hearing and the introduction of evidence concerning the mental competency issue. The only distinguishing factor the Court perceives in respondent's different position is that respondent perceives the issue of mental competency to be a closer question, one which might in fact require

a federal hearing. The Court may not tolerate this type of conditional waiver of the exhaustion requirement. Stamper v. Baskerville, 724 F.2d 1106. Therefore, in the instant case, the Court would best preserve the integrity of federal-state relations and judicial proceedings by denying respondent's request to withdraw its unconditional waiver concerning the incompetency allegations even though petitioner will possibly be allowed to present new proof, not presented to the state courts.

This decision has the additional benefit of avoiding the possible prejudice which petitioner may otherwise suffer as a result of the unusual procedural nature of this case. After respondent unconditionally waived the exhaustion requirement, petitioner abandoned his state court action and dismissed it. Because of petitioner's election to dismiss the second motion for appropriate relief, he may be barred from raising these new claims if he should try to return to state court. The loss of this hope provides some additional basis for holding respondent's feet to the fire.

Finally, the Court finds that respondent will not be unfairly prejudiced by this decision. As will be pointed out later, claims of incompetency at the time of trial can be raised in post-conviction relief even if not raised at trial. Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987). However, petitioner bears a heavy burden in such instance. Id. Considering the nature of the claim, the Court finds that permitting petitioner to pursue the matter in federal court better serves the ends of justice and would

not injure federal-state relations. Therefore, respondent's motion to dismiss the petition for petitioner's failure to exhaust the alleged new claim based on new proof of petitioner's mental incompetency should be denied. For these same reasons, the Court should deny respondent's motion to amend the answer to add this allegation as a defense.

B.(2) Dismissal of Claims for Being Procedurally Defaulted

Respondent alleges that a substantial number of petitioner's claims are not available for review in federal court because of petitioner's procedural defaults in state court. Federal district courts are directed not to review federal claims denied by state courts when the state decision is premised on a state law ground which is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. Coleman v. Thompson, ____ U.S. ____, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

This solicitude to state law arises from concerns of comity and federalism. Id. Moreover, when the independent and adequate state ground is based on a state procedural default, there are additional reasons for refusing to review the claim. A procedural default effectively deprives the state of an opportunity to correct its own mistake because the matter has not been presented to the state court first. Id. Therefore, when federal court refuses to entertain claims which have been procedurally defaulted, it furthers the same policy which supports the exhaustion requirement.

Exhaustion and procedural default differ in one respect, however. While a state may unconditionally waive the exhaustion of remedies requirement, that waiver does not encompass procedural defaults. Therefore, even though a respondent may have waived the exhaustion requirement, a federal court is still precluded from entertaining the claim if it determines that state law would bar review of the claim because of a procedural default. Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1639, 113 L.Ed.2d 734 (1991). The reason for this is that "when it is clear that the state law would bar state review, exhaustion is not required, and federal review is precluded." Id. at 937. Respondent waived exhaustion but requested the Court apply the procedural default rule. Therefore, the Court must look to North Carolina law in order to determine which claims have been procedurally defaulted.

Respondent has identified those claims which petitioner raised previously in his motion for appropriate relief or on direct appeal. Those are: Claim VI; those parts of Claim VII alleging ineffective assistance of counsel on appeal with respect to failing to appeal the change of venue and special venire motion, exclusion of three jurors, exclusion of jurors for opposition to the death penalty, prosecutorial misconduct, the death penalty being disproportionate and arbitrary; Claim IX; Claim X and Claim XIII. See November 1, 1988 Answer at 3-9. Petitioner does not dispute the list. The remaining claims have never been presented to the state courts.

In order to apply state procedural default rules, the federal court must find that the state practice makes sense and is more than an empty ritual. James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). That is, the remedy must be adequate. The state courts must be firmly committed to consistently applying a general rule with exceptions only for extraordinary situations. Meadows v. Legursky, 904 F.2d 903, 906 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 523, 112 L.Ed.2d 534 (1990). However, consistent application does not mean "undeviating adherence to such rule admitting of no exception." Id. at 907.

North Carolina's rule for procedural default is found at N.C.G.S. § 15A-1419. The statute permits a motion for appropriate relief to be denied when a petitioner was in a position to raise the issue previously but did not. Section 15A-1419(a)(1).[3] A

[3] N.C.G.S. § 15A-1419(a)(1) further provides that it does not apply to claims of deprivation of the right to counsel at trial or the failure of the trial court to advise the defendant of such right. Petitioner urges the Court to include claims of ineffective assistance of counsel within the exception, citing Perry v. Rogers, No. 88-7194 (4th Cir. April 28, 1988)(unpublished). However, this Court would disagree with petitioner's interpretation.

The state courts have not interpreted the exceptions to N.C.G.S. § 15A-1419(a)(1). In interpreting state statutes, this Court is required to make a determination of how the highest court in North Carolina, the North Carolina Supreme Court, would interpret the statute. Sanderson v. Rice, 777 F.2d 902, 906 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). In so doing, it is concluded that the North Carolina Supreme Court would not interpret Section 1419(a)(1) as exempting claims of ineffective assistance of counsel.

The official commentary to Section 1419(a)(1) does not make any mention of an ineffective assistance of counsel claim. Rather, it notes that the first exception is a "rather obvious one of deprivation of the right to counsel." Not having counsel at all is, in fact, a very serious matter. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). An ineffective assistance of counsel claim is one of an entirely different nature and does not rise to the level of total denial of counsel. In contrast, the total deprivation of counsel is more like a claim of lack of jurisdiction which may not be waived. See Hailey v. Dorsey, 580 F.2d 112, 115 (4th Cir. 1978), cert. denied, 440 U.S. 937, 99 S.Ct. 1282, 59 L.Ed.2d 495 (1979).

(continued...)

motion for appropriate relief may also be denied when the issue was previously determined on the merits. N.C.G.S. § 15A-1419(a)(2). Finally, subsection (a)(3) provides for a procedural default when petitioner was in a position to adequately raise the matter in an appeal but failed to do so. Section 1419(b) acts as a safety valve and provides a court with discretion to grant the relief "in the interest of justice and for good cause shown."

The North Carolina courts do enforce the procedural default rule of N.C.G.S. § 15A-1419. State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391, 395 (1980); see Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, ___ U.S. ____, 111 S.Ct. 693, 112 L.Ed.2d 683 (1991); and Cole v. Stevenson, 620 F.2d 1055 (4th Cir.)(en banc), cert. denied, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980). However, one must distinguish between enforcement of the bar in a situation where the state court has itself enforced the bar from when the matter is before the federal court in the first instance and the state has waived exhaustion of remedies.

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[3](...continued)

To read the statute as excepting ineffective assistance of counsel claims would effectively frustrate the entire purpose of having a procedural default rule. Such claims can be legion and based on any matter in the trial whereas the denial of counsel vel non is usually a single, discrete act. A petitioner could litigate his conviction indefinitely.

The unpublished decision in Perry v. Rogers, supra, bases its conclusion on the fact that in another, unrelated circumstance, the North Carolina Supreme Court indicated that the right to counsel contemplates effective assistance of counsel. It is unlikely that the North Carolina Supreme Court would create such a large gap in its procedural default rule based on the application of a general principle. Therefore, it is concluded that Section 1419(a)(1) does not except petitioner's ineffective assistance of counsel claims from the procedural bar of Section 1419(a)(1).

When the state court has itself applied the procedural bar to one of petitioner's claims, the federal court need not speculate as to whether the state court would employ the bar as to that particular claim. When the state court has not employed the bar, a federal court needs to make a reasoned determination of whether the state court would apply the procedural bar rule even when the state has waived exhaustion of remedies. Bassette v. Thompson, 915 F.2d 932. The job of the federal court in North Carolina is particularly difficult because of the discretion given to state courts by Section 1419(b). The Court finds that Section 1419(b) is sufficiently ambiguous to preclude enforcement of the North Carolina procedural bar rule unless a state court has actually enforced it as to a particular claim.

Petitioner cites Richardson v. Turner, 716 F.2d 1059 (4th Cir. 1983). The situation before the Richardson court was slightly different but the Court feels bound by its reasoning. There, a district court decided both exhausted and unexhausted claims on their merit, finding that the state court likely would employ its procedural bar rule of N.C.G.S. § 15A-1419 as to the unexhausted claims. Finding a return to state court to be a futile action, the district court rendered judgment. On appeal, the Fourth Circuit determined that Section 1419(b) was not sufficiently fixed or certain so that one could conclude that the state court would not grant relief with respect to any specific claim. It noted that there was no reported decision interpreting the "interest of justice and for good cause shown" exception to Section 1419(b). It

further found that North Carolina superior court judges have employed it. It, therefore, determined that even though petitioner had previously filed for state post-conviction relief, the federal court could not determine that it would be futile to require him to exhaust any claims not previously presented to the state court.

Respondent has failed to show that the North Carolina courts do strictly or regularly enforce post-conviction procedural defaults when the petitioner seeks to come within the Section 1419(b) exception. Nor has any state court decision subsequent to Richardson construed Section 1419(b) so as to provide guidance in determining what issues come within the exception. Given these circumstances, respondent's request that this Court enforce the state procedural bar rules of Section 1419 against petitioner must be denied.

C. Merits

The Court will now turn its attention to the merits of petitioner's claims along with the subsidiary issues of whether petitioner is entitled to an evidentiary hearing or the appointment of a psychiatric expert, and whether the claims are barred for attempting to assert a new constitutional rule. It will address the claims in the order that they appear in the petition. The facts of this case will be summarized from the decision by the North Carolina Supreme Court.

> In December 1980, Buren Shinn resided in a house on Old Salisbury Road approximately three miles from Concord. Buren's son Wayne lived in a house located about 100 yards away. Buren and Wayne worked together in a family electrical business.

After driving to his father's home on 4 December 1980, Wayne heard the burglar alarm at his own home. Wayne and Buren jumped into a truck and rushed over to Wayne's house, where they observed a dirty brown Ford parked in the driveway. Wayne got out of the truck and ran towards the patio at the side of his house. Buren then saw Wayne throw up his hands and heard a gun fire.

Buren ran to the truck, got in and began backing the truck in an effort to get away. Defendant ran toward him, waving a pistol. This sight diverted Buren's attention and he backed the truck into a ditch. Defendant approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with defendant not to hurt him.

Before Buren reached the house, he heard another gunshot and felt a sharp blow to his head. He fell to the ground and lost consciousness. Sometime later he "came to," finding himself lying in a large pool of blood. Fearing that defendant might still be in the vicinity, he lay silently. Some twenty or thirty minutes later, he heard someone walk toward him and he felt a hand reach into his pocket and take his wallet.

Buren remained motionless for another twenty minutes. Hearing no more footsteps, he partly raised himself up. Seeing no one, he crawled away from the patio toward the road, hoping to stop a passing car. When no one stopped, he struggled to his feet and walked toward his home. As he entered his home, another son, Jerry, saw him and telephoned for help. After Jerry was told what had happened, he left to see about Wayne.

Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound to his head. Buren's injuries were not severe, as the bullet which struck him did not penetrate his skull. He recovered after a short stay in the hospital.

The police found Wayne's house ransacked. They found several jewelry items and a camera in a pillowcase, apparently dropped by the intruder. Marks on the kitchen door indicated the house had been forcibly entered.

Phyllis Soden, who had known defendant for several years, returned to her home from work at about 4 a.m. on 4 December 1980. Shortly after 9 a.m. defendant went to her home and stated that he needed her to take him some place immediately. Leaving his dirty brown Ford in her

driveway, the two departed in her automobile. Defendant directed her to drive on the Old Salisbury Road. As they neared the Shinn home he told her to stop, let him out, drive a short distance farther, turn around, and return to pick him up. She followed defendant's directions. When she returned, he ran to the car carrying a crowbar.

After they returned to Ms. Soden's home, defendant explained that he had broken into a house and had left the crowbar there. He wanted to retrieve the bar because it might have his fingerprints on it. A little while later, defendant showed her a wallet and removed the money from it. Thereafter, he told her: He had broken into a house after hearing that the residents had gold and jewelry. He found some items and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. He pointed his gun at the man who put up hands. He ordered the man to turn around and shot him in the back of his head. After the man fell, he ran out of the house. When he left the house, he saw another man approaching the patio. The other man turned, ran and entered a truck. He ordered the man out of the truck; and, although the man begged defendant not to shoot, defendant forced him to walk toward the patio and shot him in the back of his head. He was confident both of the other men were dead because he shot them at close range. He killed them to eliminate witnesses because he did not want to go back to prison.

Defendant offered no evidence at the guilt-determination phase of the trial.

The jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury upon Buren Shinn and felonious breaking of the home of Wayne Shinn. It also convicted him of the first degree murder of Wayne Shinn.

The following transpired at the sentencing phase of the murder case. Outside the presence of the jury defendant was examined under oath by his counsel. During this examination defendant testified that his counsel had fully advised him regarding the nature of the sentencing phase of the proceeding. Defendant also acknowledged that on 6 June 1981 he signed an affidavit in which he acknowledged that he told his attorney, Mr. Johnson,

> on at least five separate occasions . . . that should I be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The trial judge then advised defendant that notwithstanding his desire to be sentenced to death, the jury must make that decision and that the court by law was required to submit whatever aggravating and mitigating circumstances were supported by the evidence. The trial judge said, "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may . . . still see fit to recommend life imprisonment."

The jury was then brought back into the courtroom. Defendant testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the state "involving some criminal matters in Stanly County some years ago." The following colloquy then occurred:

Q. At this time would you tell the jury what your request is regarding their decision?

A. I'd like the death penalty.

Q. Would you care to tell us why you want the death penalty?

A. To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life that's not right. You think I done it, gas me.

Q. And you're — you know what you're asking?

A. Yes, sir.

Q. You know it's my responsibility to try to save your life?

A. Yes, sir.

Q. That's all.

> There was a brief cross-examination by the state during which defendant admitted that he owned a .32 caliber pistol in September 1980; he had attempted to purchase a pistol shortly after 4 December 1980; and on 4 December 1980 he had gone to Salisbury with Phyllis Soden. At the guilt phase of his trial a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 caliber bullet.

State v. Lawson, 310 N.C. at 634-637, 314 S.E.2d 495-497.

Claim I - Jury Instructions Violated Mills/McKoy Rule

In his first claim for relief, petitioner alleges that the jury instructions in this case violated the rules, on how a jury may consider mitigating circumstances, established by the Supreme Court in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

In Mills, the Supreme Court found jury instructions unconstitutional when there was a substantial probability that the jurors may have thought they were precluded from considering mitigating circumstances unless all of them agreed on the particular mitigating circumstance. The verdict form, which the jurors answered with respect to mitigating circumstances, indicated that they unanimously found mitigating circumstances. The Supreme Court found nothing in the judge's instructions that might dispel the erroneous inference. The Supreme Court was afraid that such a verdict form could lead jurors to think that one holdout member, who did not wish to find mitigating circumstances, could bind all of the others.

In McKoy, the court instructed the jurors on Issue Two which asked whether the jurors unanimously found from the evidence one or

more mitigating circumstances. The verdict form then instructed them to answer "Yes" as to each circumstance if they unanimously found it from the evidence, but write "No" if they did not so unanimously find. The Supreme Court again found this created the risk that a holdout juror could prevent the others from considering mitigating evidence which they believed would require them to vote against the death penalty.

Petitioner claims that the jury instructions in this case violated the Mills/McKoy rule. He points out that in a number of instances the state trial court instructed that the jury must act unanimously in reaching a sentence verdict or finding aggravating circumstances. He admits that the court did not instruct the jury to act unanimously in finding mitigating circumstances. However, he claims that the court should have made it clear that the jury need not act with unanimity with respect to mitigating circumstances.

Petitioner recognizes that his claim on this issue is very weak because the court peremptorily instructed the jury that it must find mitigating circumstances from the fact that petitioner did not have a significant criminal record and had cooperated with the state in other criminal cases. Thus, the jury was required to find mitigating circumstances. Nevertheless, petitioner states that there were other mitigating factors which the jury could have found and on which he bases his claim of prejudice. He points to the testimony which came out in the case-in-chief from petitioner's girlfriend and state witness that petitioner had not acted

violently and was helpful and from another state witness that petitioner came from a broken home, that his parents were divorced and he was brought up in Michigan by his mother.

Respondent requests this claim for relief be denied because pursuant to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)(capital sentencing), the court may not apply a new constitutional rule retroactively. In the instant case, petitioner's conviction became final when the United States Supreme Court denied certiorari review from his direct appeal. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (May 20, 1985). Mills and McKoy were, of course, decided long after that date. The Teague/Penry bar holds that new constitutional rules will not be applied retroactively in cases on collateral review unless they fall within two exceptions which will be discussed later. A new rule is one which breaks new ground or imposes a new obligation when the result was not dictated by existing precedent. Penry, 492 U.S. at 314.

The Court finds that the Mills/McKoy rule was the announcement of a new rule which may not be retroactively applied in this case. For this decision, the Court relies on the strongly worded dicta in McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991). There, the Fourth Circuit stated that the Mills and McKoy cases represent new law which may not be retroactively applied based on Teague.

Petitioner's citations from other circuits do not explicitly decide the issue otherwise. Moreover, this Court has recently come to the same conclusion in Garner v. Dixon, C-88-179-WS (M.D.N.C. Sept. 11, 1991)(adopting June 25, 1991 Recommendation of U.S. Magistrate Judge). Furthermore, the Eastern District of North Carolina has held similarly in Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991). See also Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala.), stay and cert. denied, ____ U.S. ____, 111 S.Ct. 1, 111 L.Ed.2d 817 (1990).

Petitioner next asserts that the Mill/McKoy rule is not new but merely an extension of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982). This argument is rejected because in Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the Supreme Court characterized those decisions as merely holding that the state cannot bar mitigating evidence. It found the cases had no application to the issue before it which was whether the state can instruct a jury not to base its decision on sympathy. This Court finds the Mill/McKoy issue before it is likewise not related to "what mitigating evidence the jury must be permitted to consider in making its decision, but to how [or when] it must consider the mitigating evidence." Saffle v. Parks, 494 U.S. at _____, 110 S.Ct. at 1261 (emphasis added).

Petitioner continues that his case falls within one of the two exceptions to the Teague/Penry bar. One exception is a rule which implicates the state's power to punish. He relies on the other

exception for watershed rules of criminal procedure which implicate fundamental fairness and accuracy of criminal proceedings. Teague v. Lane, 489 U.S. at 311. The Court disagrees.

In Saffle v. Parks, 494 U.S. 484, the Supreme Court elaborated on this exception. It noted that the exception was reserved for central and primary matters such as the right to counsel announced in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The alleged error of a trial judge instructing a jury not to consider sympathy did not fall within the exception. Neither does this case which only involves how or when a jury can consider mitigating evidence. In a sense, all sentencing rules seek to enhance fairness and accuracy. Petitioner would convert the exception into one without limits. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 305 (3d Cir. 1991), cert. denied, ____ U.S. ____, 112 S.Ct. 280, ____ L.Ed.2d ____ (1991). The McKoy/Mill rule is not an absolute prerequisite to fundamental fairness. See Id.

Even if the Teague/Penry bar were not available, petitioner is still not entitled to relief. The reason for this is that the sentencing instructions in the case do not violate the Mills and McKoy rule. Almost the exact situation arose in Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991).

The jury instructions in the instant case appear to be the same as those considered by the Fourth Circuit in Maynard. There, as here, the state court instructed the jury that it must render a unanimous decision with respect to its verdict and in particular with respect to finding aggravating circumstances. It was

instructed to determine unanimously the applicability of two aggravating circumstances and whether one or both were sufficiently substantial to call for the death penalty. However, with respect to the third issue of mitigating circumstances, the court did not mention that the finding had to be unanimous. Finally, as to the fourth issue, the jury was again instructed to determine whether it unanimously found the aggravating circumstances outweighed the mitigating circumstances.

The Fourth Circuit determined in Maynard that there was no error because the trial court carefully instructed the jury that it must unanimously find aggravating circumstances but did not impose such a requirement with respect to mitigating circumstances. It contrasted the situation from that in State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1403, 113 L.Ed.2d 459 (1991), which petitioner relies on. There, significantly, the North Carolina Supreme Court found that the trial court had stated that answers to all the issues must be unanimous. No such language was found in the Maynard instructions and, therefore, the court found no implicit instruction of a unanimity requirement with respect to mitigating circumstances. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 306-308 (3d Cir. 1991); Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1608, 113 L.Ed.2d 669 (1991).

The same reasoning of Maynard applies to the instant case. Further distancing this case from McNeil, here the state court peremptorily instructed the jurors that they must find two

mitigating circumstances. Thus, the jury was required to make the answer to the mitigation issue "Yes," and was also told it could consider any other circumstance arising from the evidence. (Tr. 782) Under these circumstances, there is even less concern that the jury was somehow misled into thinking they must unanimously find a mitigating circumstance in order to consider it. Petitioner's request for the appointment of a linguistic expert to forecast what reasonable jurors would have determined from these instructions is unnecessary and should be denied. Therefore, petitioner's first claim for relief should be denied.

Claims II, III and Part of VII - Competency Issue

Petitioner makes three basic claims concerning the competency issue. The first two are directly asserted in Claims II and III. The other one arises in Claim VII, petitioner's ineffective assistance of counsel claims, at ¶¶ 110 and 111. Claim II alleges that petitioner was denied due process of law because he was not mentally competent to be sentenced.

For facts, petitioner states that as a result of early childhood development, he has a history of self-destructive behavior and behavioral manifestations indicative of severe mental illness. To support those conclusions, he recites that his parents separated when he was two years old and he lived with his maternal grandparents until the mother remarried when he was four years old. His step-father allegedly abused alcohol. Petitioner had a fight with the step-father and thereafter they had little communication. He quit school when he was fifteen or sixteen and moved out to live

on his own. He enlisted in the Marine Corps at seventeen but was discharged on a disability. Thereafter, he left Michigan and located his natural father but was not able to establish a satisfactory relationship. He worked as a logger and in a sawmill until the murder and his conviction for it.

Petitioner alleges that his feelings of helplessness were exacerbated by counsel erroneously telling him he would not be eligible for parole until after 180 years (PCHT 180-84).* Petitioner also claims that he was further depressed because his girlfriend, Phyllis Soden, to whom he disclosed and bragged about his crime and attempted to implicate in the coverup, testified against him at his trial. This allegedly caused him to feel betrayed and abandoned. These facts and other actions of his attorney allegedly demonstrated that others cared little about whether he lived or died and led him to abandon his own defense. As proof, petitioner recites that he did not offer evidence at the guilt or sentencing phases of the trial but that there were a number of people, including employers and friends, who would say that he was sad, honest, conscientious, easy going and not quick tempered. Petitioner states that these facts "impelled him to request that he receive the death penalty at sentencing."

In Claim III, petitioner alleges that he was not competent to waive his right to a reliable sentencing determination, the absence of which violates the eighth amendment of the United States Constitution. Petitioner re-alleges the grounds previously

*Post-Conviction Hearing Transcript of May 26, 1987 hearing.

discussed concerning Claim II. In addition, he objects that at the sentencing hearing, counsel introduced a signed statement whereby petitioner acknowledged that he understood the sentencing process and, nevertheless, still wished counsel to proceed as petitioner had directed him to do. Petitioner criticizes the court for not informing petitioner of his rights at sentencing or inquiring as to his mental state nor making any findings as to petitioner's mental state or holding a hearing on the matter.

With respect to the ineffective assistance of counsel claims, petitioner criticizes counsel for failing to make a motion for the appointment of a psychiatrist for the defense to assist him in preparation of the case for both guilt and sentencing. Petitioner alleges that counsel should have been aware of petitioner's "unusual behavior regarding reluctance to involve family members in the presentation of the penalty phase mitigation" (Petition at 31) as grounds to support this motion. Petitioner alleges that if a motion had been made, the trial court could necessarily have granted it. He further states counsel failed to present evidence to the court to support a motion for a psychiatrist.

Petitioner supplements the petition with his motion for the appointment of a psychiatric expert. He offers the affidavit of Billy Royal, M.D. Dr. Royal has interviewed petitioner several times and reviewed petitioner's psychiatric evaluation while at Dorothea Dix Hospital. He opines that the Dorothea Dix evaluation was deficient in failing to develop or assess a social or developmental history to support its psychological findings of

competency. He further offers an opinion that petitioner was not competent approximately eight years earlier, based on petitioner's developmental disabilities, depression and other mental problems, along with the stress of the situation. He recounts the facts previously stated in the petition. Dr. Royal offers the conclusion that petitioner has difficulty developing relationships with men and women. Petitioner allegedly accepts a "macho" view of the world, stressing physical courage, domination, aggressiveness or violence. He allegedly represses and denies his emotions, and likes to view himself totally in charge of a situation. Dr. Royal opines that this resulted in petitioner's inability to control his behavior and decisions during the trial process and resulted in his making the "rather bizarre" decision to wish death rather than life imprisonment. He adds that the same factors played a role in petitioner's behavior at the time of the offense and that there is evidence of drug use which may have impaired petitioner's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. He finally concludes that the substance abuse may have rendered petitioner mentally or emotionally disturbed at the time of the offense.

In addition, the Court has expanded the record to include the state court competency report of petitioner conducted at Dorothea Dix Hospital from January 29, 1981 to February 5, 1981. This report indicates petitioner was competent to stand trial and noted no history of mental illness or any sign of irrational or bizarre behavior which would give a hint of any incompetency or mental

infirmity. In submitting the competency report to the Court, respondent states that the state court record does not show that a motion was made for a competency hearing nor was a hearing held, presumably because the report provides no basis for either a motion or hearing.

The report was based on interviews with petitioner, a physical examination, tests and observation. It shows that petitioner was alert and cooperative and had a normal stream of mental activity. He did not have hallucinations or delusions. While he did not have suicidal thoughts, he reported his previous depression and thoughts concerning the time when he fathered an out of wedlock child. It also included his family and present social history.

The psychological report indicated petitioner suffered from low self-esteem, had feelings of inferiority, insecurity and inadequacy and was self-centered with an exaggerated need for affection. This led to his being somewhat self-dramatic, hostile, and resentful with a tendency to use projection and acting out as defense mechanisms. His impulse control was found somewhat deficient. The report concluded that he had an adjustment disorder but was fully competent to stand trial.

The report indicates that petitioner denied any use or significant use of alcohol or drugs and this was verified by his girlfriend Lisa Green. Furthermore, the progress notes indicate that petitioner tended to have a macho image of the world but that the interviewer felt that he was a genuinely tough person. He was

also described as being well oriented but with likely little conscience.

This description of petitioner does not vary markedly from that offered by Dr. Billy Royal. While Dr. Royal faults the Dorothea Dix evaluation for not developing a social or developmental history, the psychological description of petitioner is similar. What differs is the conclusion reached by the different evaluators. The Dorothea Dix people found petitioner to be competent. Dr. Royal, relying on essentially the same factors, finds petitioner incompetent. However, an additional part of Dr. Royal's opinion is premised on his categorization of petitioner's desire to die rather than suffer life imprisonment as a bizarre mental attitude. Yet, petitioner's Dorothea Dix examination testing results seem to indicate petitioner had a genuine loathing of incarceration. Also, Dr. Royal indicates there is evidence of drug use. However, the record shows that petitioner consistently denied drug use to the Dorothea Dix counselors, his own attorney, his girlfriend Phyllis Soden and his girlfriend Lisa Green.

Finally, the Court has considered the state post-conviction hearing transcript (PCHT) where the issue of competency was discussed. This reveals that counsel found that petitioner's mental processes, reasoning and logic were perhaps the best of any client he had represented. (PCHT 64) Counsel did not claim to have formal training in psychiatry but did have a minor in sociology and psychology in college. Id. Petitioner never indicated to counsel that he had any emotional or mental problem.

(PCHT 57) As to past drug use, petitioner stated he never used the stuff and was smart enough to avoid it. Id.

Petitioner's counsel emphasized that the evaluation was at the request of former counsel who were only briefly in the case. (PCHT 58) When petitioner went down for the psychiatric evaluation at Dorothea Dix, counsel did not feel that there was any problem. (PCHT 63) Counsel saw no need for further evaluation because it appeared that petitioner was speaking with reason and logic and knew what he was doing. (PCHT 64-65) He found that petitioner was not "an emotional con artist." Id.

After petitioner stated he desired the death penalty, counsel did not request additional psychiatric evaluation because he found that petitioner appeared to be competent and the decision was based on petitioner's life philosophy, which was not unreasonable but rather was well thought out. (PCHT 61-62) Counsel had great respect for petitioner's religious and philosophical beliefs which led him to make the decision.

In addition, counsel had tape recordings of his discussions with petitioner. (PCHT 179-203)-Attachment to Pl. No. 29. In these discussions, it is clear that petitioner's major concern was to avoid a conviction. A conviction would violate his life philosophy because it would result in his being locked up in prison. He indicated that the killing was done deliberately simply to avoid being caught. (PCHT 200) He relates that he would likely kill again if released and put in that same situation. His only remorse was that the older Shinn (Buren) did not die so Shinn could

not have identified him. Petitioner also described his life as a youth which indicates disagreement with his family and the beginning of a life of crime, and lack of concern for other human beings, which continued up until the murder. (PCHT 194-99)

The tape recording further reveals petitioner's focused desire for an acquittal so he could continue his life of crime. If he were convicted, he wanted to die because he did not want to live in prison where he could not have money, power and women. (PCHT 185-86; 193-94) Petitioner relates that he has always had larceny in his blood and the only reason he steals is that he cannot get enough money to get all of the things that he wants and that if released, he would continue with this life. Id. In prison, he felt he would lead essentially a useless life, and also he had a belief that everyone has to die some time and that quality of life counts more than the quantity. (PCHT 183-84) Also, there was some thought about reincarnation. (PCHT 185)

Turning to the legal contentions, petitioner raises two main claims. First, he appears to argue in Claims III and VII that the proper procedure was not followed with respect to his competency. He assumes that he waived the reliable sentencing hearing by his actions and that the court and his own attorney erred in failing to take steps to look into his competency and hold a hearing. In Claim II, petitioner simply alleges that he was not competent at the time of his trial. Petitioner dresses his claim of incompetency in a variety of different garments. Thus, even though the record shows that petitioner indicated he understood his rights

and wished his attorney to procure the death penalty, petitioner now argues that he was incompetent to waive his rights.

The Court will start its review with the issue of waiver. A person may not waive the right to stand trial if he is incompetent. Bundy v. Dugger, 816 F.2d 564 (11th Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.d 149 (1987). Therefore, the fact that petitioner restricted his attorney's presentation of evidence at the sentencing hearing and made the statement to the jury that he desired death cannot be construed as a valid waiver if petitioner were incompetent. Thus, categorizing petitioner's actions as a waiver does not help to advance the analysis.

The next issue is whether a different standard is to be applied because petitioner attempted to truncate or forego legal proceedings in a death penalty case. In that context, the standard for evaluating such cases was set forth in Rees v. Peyton, 384 U.S. 312, 314, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966). There, the Supreme Court determined the test was whether the petitioner "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Id. In contrast, the test with respect to whether an individual is simply competent to proceed at trial has been stated by the Supreme Court in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) to be "whether [petitioner] has sufficient present ability to consult with his lawyer with a reasonable degree

of rational understanding--and whether he has a rational as well as a factual understanding of the proceedings against him."[4]

Notwithstanding the different phraseology between the Dusky and Rees standards, it has been determined that the differences are merely semantic. As stated in Giarratano v. Procunier, 891 F.2d 483, 487 (4th Cir. 1989), cert. denied, ____ U.S. ____, 111 S.Ct. 222, 112 L.Ed.2d 178 (1990):

> Actually there is no substantive difference between the two standards. Both seek to assure that one charged with crime will not be tried or punished unless he has the mental capacity to understand the situation that confronts him and the ability to consult rationally with his counsel about his defense.

Therefore, whether the issue is examined as petitioner's competency vel non or his competency to waive rights at the death sentencing proceeding amounts to simply whether he could understand the situation and reasonably consult with defense counsel.

Next, the Court will explore whether the state court attorney should have made a motion for a competency hearing or the judge sua sponte should have conducted a competency hearing. This issue is distinct from the issue of whether defendant was, in fact, competent to stand trial. Card v. Dugger, 911 F.2d 1494, 1518 (11th Cir. 1990); Fallada v. Dugger, 819 F.2d at 1567-68 n.1; Enriquez v. Procunier, 752 F.2d 111, 114 (5th Cir. 1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2658, 86 L.Ed.2d 274 (1985). The

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[4] In contrast, in order to execute a person, the court need only determine whether petitioner can understand the nature and purpose of punishment. There is no requirement of an ability to assist counsel. Rector v. Clark, 923 F.2d 570, 572-73 (8th Cir. 1991), cert. denied, ____ U.S. ____, 111 S.Ct. 2872, 115 L.Ed.2d 1038 (1991).

issue of competency vel non, as opposed to whether proper procedures were employed, may be raised even when a bona fide doubt of competency was not raised at trial and in addition, the burden on the defendant is substantially higher. Fallada v. Dugger, 819 F.2d at 1567-68 n.1; Card v. Dugger, 911 F.2d at 1518; Enriquez v. Procunier, 752 F.2d at 114.

Turning first to the issue of failure to observe procedures adequate to protect a defendant from being tried or convicted while incompetent, such dereliction deprives a defendant of due process of law. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. at 384-86; Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991); Fallada v. Dugger, 819 F.2d at 1568. The trial court is required to convene a competency hearing sua sponte whenever sufficient evidence comes to its attention creating a bona fide doubt concerning the defendant's competence to stand trial. Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 22, 111 L.Ed.2d 834 (1990); Flugence v. Butler, 848 F.2d 77, 79 (5th Cir. 1988). A hearing must be convened if the evidence at the trial or immediately related proceedings raises a substantial or bona fide doubt of defendant's competency. McInerney v. Puckett, 919 F.2d 350, 351 (5th Cir. 1990); Hernandez v. Ylst, 930 F.2d at 716. Should the trial court ignore a bona fide doubt and fail to convene a hearing, a nunc pro tunc competency hearing must be convened if possible or else the conviction set aside. Fallada v. Dugger, 819 F.2d at 1568.

In reviewing a case where the trial judge failed to convene a competency hearing, the reviewing court must determine whether a reasonable trial judge should have experienced a bona fide doubt as to petitioner's competency. Hernandez v. Ylst, 930 F.2d at 716. The test to be employed is an objective one. Id. The issue is whether the objective facts which were known by the trial judge were sufficient to raise a bona fide doubt as to petitioner's competency. Fallada v. Dugger, 819 F.2d at 1568; Flugence v. Butler, 848 F.2d at 79.

The significant historical facts relevant to determine whether there was evidence of a bona fide doubt as to petitioner's competency requires consideration of three factors: (1) historical evidence of mental illness; (2) substantial evidence of mental incompetence at or near the time of the hearing supported by medical opinions; and (3) petitioner's demeanor at trial and evidence of irrational behavior. Card v. Dugger, 911 F.2d at 1518; Flugence v. Butler, 848 F.2d at 79. Any one of these factors may be sufficient to raise a bona fide doubt, and the information need not be presented in a formal motion or in the form of proper evidence so long as it is fairly before the court. Coleman v. Saffle, 912 F.2d at 1224; Porter v. Estelle, 709 F.2d 944, 949-50 n.3 (5th Cir. 1983), cert. denied, 466 U.S. 984, 104 S.Ct. 2367, 80 L.Ed.2d 838 (1984).

Petitioner has failed to carry his burden. There is no objective evidence which supports petitioner's claim and his merely raising the issue now is simply insufficient. Coleman v. Saffle,

912 F.2d at 1226. Here, there is no history of prior mental illness in the past, much less near the time of the trial. To the contrary, petitioner was evaluated for competency and found competent to stand trial. While petitioner submits the affidavit of Dr. Royal who questions that finding, Dr. Royal's affidavit was not before the state trial judge at that time and, therefore, is irrelevant to the inquiry. Hernandez v. Ylst, 930 F.2d 718; Porter v. Estelle, 709 F.2d at 953.

Nor does petitioner show any evidence of bizarre behavior or activity at trial which raised any indication that petitioner was incompetent. Petitioner attempts to assert that his decision to not fight the death penalty constituted bizarre behavior raising a bona fide doubt about his competency. However, this contention may be rejected. As the state argues, the mere fact, that a defendant requests the death penalty if he is convicted or decides not to fight the death penalty, does not demonstrate incompetence or bizarre behavior in the sense that petitioner is incompetent or mentally deficient. Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988); Streetman v. Lynaugh, 835 F.2d 1521 (5th Cir. 1988); Autry v. McKaskle, 727 F.2d 358 (5th Cir.), cert. denied, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984); and see also Balfour v. Haws, 892 F.2d 556 (7th Cir. 1989).

In the instant case, upon reviewing the post-conviction hearing transcript and petitioner's statements to counsel, it is clear that petitioner, like the one in Byrne, may appear to

demonstrate extreme callousness and lack of remorse, but this is not the equivalent of an underlying mental disorder. Byrne v. Butler, 845 F.2d at 513. Nor, is a competency hearing required simply because a client prohibits his attorney from taking actions which would avoid the risk of a death sentence. Streetman v. Lynaugh, 835 F.2d at 1525 n.13.

In the instant case, petitioner's decision to request the death penalty from the jury and to restrict counsel's actions at the sentencing hearing came from a well thought out, knowing and deliberate decision on his part. The record shows that counsel and petitioner reviewed the situation thoroughly and that petitioner's decision was not a spur of the moment one but rather an intelligent and deliberate choice consistent with petitioner's life philosophy. Present counsel's argument, premised on the view that the preservation of life at any cost, under any circumstance, constitutes the highest life principle, is a matter which the greatest philosophers and theologians have debated. Autry v. McKaskle, 727 F.2d at 363.

Not only does petitioner's request for the death penalty not constitute evidence of his incompetence, but the evidence in this case positively supports a contrary conclusion. Here, we have an individual who committed two extremely callous acts and had no sign of remorse. The evidence shows petitioner to be a person who is quite well able to look after himself and tends to put himself first in most situations. His decision not to live life, unless he could live it as he desired, is consistent with his philosophical

outlook and indicates that he was taking very good care of himself using his own standards. While others might not share those standards, neither would they act on those standards in the way which caused petitioner to commit the acts that he did.

The record does not show that petitioner sunk into a pit of despondency or helplessness. Rather, the case against petitioner was extremely strong. Yet he continued to urge his attorney to fight for the purpose of avoiding the conviction. (PCHT 168, 179-83) Petitioner feared incarceration and already had some experience with it. It was only the thought of long years of imprisonment that prompted the request for the death penalty.

Petitioner's counsel criticizes the trial judge for not conducting a more in-depth hearing at the sentencing phase when petitioner elected to request the death penalty. However, there was no evidence at any time which would indicate petitioner was incompetent. The court is entitled to rely on the failure of counsel to file a motion. Coleman v. Saffle, 912 F.2d at 1226. While petitioner's request for death cannot be termed a bizarre statement, even bizarre statements do not mandate a competency hearing. Hernandez v. Ylst, 930 F.2d at 718. The fact that neither the trial judge, the state's attorney, nor petitioner's own attorney, perceived any issue concerning petitioner's competency constitutes a good and significant reason to find lack of merit to a competency claim. Hernandez v. Ylst, 930 F.2d at 716. Petitioner's constitutional rights were not infringed by the

failure to hold a competency hearing at any time during the guilt or sentencing phase of the trial.

The Court further finds for the same reasons that petitioner's claim that his trial counsel was ineffective for failing to request a psychiatrist or move for a competency examination is likewise frivolous. As with the trial judge, in order to succeed on a claim that the attorney rendered ineffective representation by failing to act on issues of petitioner's competency, the petitioner must show that the attorney had some indication that there was some mental impairment. Byrne v. Butler, 845 F.2d at 513; Enriquez v. Procunier, 752 F.2d at 114. Petitioner's counsel talks about the attorney's ethical duty to "educate" petitioner to abandon his own life philosophy and accept a new one now advanced. This argument stretches too far and both denigrates and exaggerates the role of counsel. Counsel is not to impose his will and philosophy on his client but to provide representation within the ethics of the profession. Therefore, once a petitioner knowingly makes a decision and is not incompetent, the attorney has an ethical duty to comply with those wishes. Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986)(counsel's suggestion to jury that life imprisonment unbearable and requesting a sentence of death); Autry v. McKaskle, 727 F.2d at 362 (instruction not to argue against death penalty).

Petitioner clearly understood the significance of the situation before him and was able to consult with and use counsel. In fact, petitioner's attorney stated that petitioner is perhaps one of the most intelligent and aware clients that he has had the

opportunity to represent. (PCHT 64) Counsel cannot be faulted in not moving for a competency hearing during the trial or sentencing.

Finally, the Court will examine petitioner's claim that at the time of the trial he was incompetent and he is entitled to an evidentiary hearing and the appointment of a psychiatric expert. As stated earlier, a challenge to competency vel non imposes a different issue than whether petitioner should have had a competency hearing. The determination of this latter issue is based on the evidence available at the time of trial. The issue of competency vel non is not so restricted and the court may consider post-trial evidence. Card v. Dugger, 911 F.2d at 1519-20. Notwithstanding, the burden upon petitioner to demonstrate incompetency is an extremely heavy one. Flugence v. Butler, 848 F.2d at 79; Card v. Dugger, 911 F.2d at 1519; United States ex rel. Lewis v. Lane, 822 F.2d 703, 706 (7th Cir. 1987); Porter v. Estelle, 709 F.2d at 949-50 n.3.

Petitioner is not entitled to an evidentiary hearing unless he can present clear and convincing evidence which creates a real, substantial, legitimate doubt as to petitioner's mental capacity and ability to assist counsel. The facts must both be positive and unequivocal. Bundy v. Dugger, 816 F.2d 564. In order to meet this standard, it has been suggested that petitioner present "a history of mental illness, substantial evidence of mental incompetence at or near the time of the trial supported by the opinions of qualified physicians and the testimony of laymen." Flugence v. Butler, 848 F.2d at 79 (quoting Bruce v. Estelle, 483 F.2d 1031,

1043 (5th Cir. 1973)). Should petitioner clear this hurdle, then an evidentiary hearing would be convened where he may prove his incompetence at the time of trial by a preponderance of the evidence. Porter v. Estelle, 709 F.2d at 949-50 n.3.

In the instant case, petitioner fails to present clear and convincing evidence of positive and unequivocal facts which generate a real, substantial and legitimate doubt as to his mental capacity. Petitioner relies on Dr. Royal's affidavit which will now be compared to the Dorothea Dix competency report.

Dr. Royal bases his conclusion of incompetency on petitioner's unhappy childhood and lack of adjustment to it. He discounts the finding of competency made by Dorothea Dix at the time of petitioner's trial for failing to develop or assess petitioner's social history. Dr. Royal recounts petitioner's failure to establish relationships with his parents and women as creating in petitioner a macho view of the world. Petitioner suppresses his emotions and tries to act as if he can control all situations. This view allegedly resulted in a lack of capacity to understand his options at the sentencing phase of the trial. However, the Dorothea Dix examiners also had knowledge of petitioner's unsatisfactory childhood, suicide attempt and macho image. They just evaluated the factors differently than Dr. Royal did.

Dr. Royal also indicates that petitioner may have had a drug problem which led to his committing the crime. However, the post-conviction hearing shows that petitioner was a career criminal. His friend Phyllis Soden, and his girlfriend Lisa Green

reported petitioner did not use drugs. Petitioner said as much to his attorney and to the people at Dorothea Dix, although the medical reports seem to note rare usage.

If Dr. Royal's affidavit had raised any question of doubt concerning petitioner's competency, the Court would have appointed Dr. Royal to conduct further examination for purposes of conducting an evidentiary hearing. However, even considering the affidavit, there is no substantial evidence of doubt concerning petitioner's competency, much less clear, unequivocal facts which are clear and convincing.

In Enriquez v. Procunier, 752 F.2d at 114, a letter from a physician suggested the defendant may be incompetent. However, the court found this was more than offset by the report of the state psychiatrist and the trial court's and defense counsel's observations. The same is true here. Indeed, aside from Dr. Royal's opinion, made some years after the trial, this case does not even have other factors, such as a history of mental problems or bizarre behavior. Even as to those factors, other courts have found they did not raise a substantial doubt as to competency. Flugence v. Butler, 848 F.2d at 80 (outburst and invocations of the Deity and subsequent diagnosis of paranoid schizophrenia); Bowden v. Francis, 733 F.2d 740, 748 (11th Cir. 1984), reaff'd, 767 F.2d 761 (11th Cir. 1985); Balfour v. Haws, 892 F.2d 556; Fallada v. Dugger, 819 F.2d 1564 (medication); contrast, Smith v. Freeman, 892 F.2d 331 (3d Cir. 1989)(opinion of mental problems at time of trial and misrepresentation by trial attorney).

Here, Dr. Royal's affidavit and opinion of incompetency, while themselves positive and unequivocal, are overshadowed by the record of competency established at the time of the trial. The Court finds that the record conclusively establishes that petitioner had the mental capacity to understand the situation facing him and the clear ability to consult rationally with his counsel about his defense. There is no evidence suggesting otherwise at the time of the trial nor has the additional evidence forecast by petitioner created a substantial issue which would necessitate an evidentiary hearing.

Consequently, the Court finds that pursuant to 18 U.S.C. § 4241 there is no reasonable cause to believe that the defendant was or is incompetent for purposes of appointment of a psychiatric expert or to require an examination of him. Streetman v. Lynaugh, 835 F.2d 1521 (allegations of childhood injury, drug use and description as atypical paranoid state, delusional ideation and inappropriate behavior). Therefore, it is determined that petitioner's Claims II, III, and ¶¶ 110 and 111 of Claim VII should be dismissed and petitioner's request for appointment of a psychiatric expert and evidentiary hearing on the issue of competency denied.

Claims IV, V, and VI - Challenges to the Sentencing Hearing

In Claims IV through VI, petitioner complains about his sentencing hearing. In Claim IV, petitioner alleges that he did not knowingly, voluntarily and intelligently waive his right to a reliable sentencing determination. In Claim V, he claims he did

not waive his right to counsel during the sentencing phase. In Claim VI, he alleges that his sentence was determined in absence of a reliable sentencing hearing.

The factual basis for these claims essentially arises out of petitioner's assumption that he was incompetent at the time of the sentencing hearing because he restricted his attorney at the sentencing phase by requesting that the jury sentence him to die if they thought he was guilty.

In support of his claims, petitioner makes a host of charges and allegations relating to whether his decisions at sentencing were knowingly, voluntarily, and intelligently made. He faults the state court for failing to establish that petitioner understood the function of the capital sentencing hearing and mitigation and for failing to inquire into petitioner's competency. This last matter has been discussed and rejected previously.

Petitioner next alleges that he did not comprehend the nature or function of mitigating evidence and if he had and counsel properly investigated the matter, he would have received a life sentence. He faults his attorney for conducting the voir dire hearing at sentencing in order to establish on the record that petitioner wished to challenge the jury to give him a death sentence if they found that he committed the crime. Petitioner concludes that his court appointed attorney was so deficient that he did not even act as an attorney and gave him inaccurate sentencing advice and defaulted on his obligations as counsel. Petitioner contends he had to act as his own counsel. Petitioner

premises the claim on the alleged unique circumstances of the case and his psychological profile, all of which indicate he was incompetent to waive counsel during the sentencing hearing. Again, the competency basis for this claim has been discussed and rejected previously.

Finally, petitioner claims the sentencing hearing was unreliable because trial counsel unreasonably agreed to represent petitioner's "incompetent" request to die. (While not stated in Claim VI, elsewhere petitioner implies that counsel had a duty to "educate" him on the merits of life imprisonment over the death penalty.) The Court likewise finds these claims without merit for reasons previously discussed in the competency section of the Recommendation.

Petitioner would attempt to analogize the situation at sentencing with the normal guilty plea in a criminal case. While the Court finds the analogy not very appropriate, it will be helpful to discuss the law as to guilty pleas and waiver for a better understanding of the claim's lack of merit.

A guilty plea must be knowingly, voluntarily and intelligently made. Voluntariness is satisfied when a defendant has adequate notice of the offense and the constitutional protection he is waiving. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). With respect to knowledge, when a defendant is represented by an attorney, the court need not conduct an explicit inquiry but may presume that defense counsel routinely explains the nature of the offense so that the defendant understands his

admissions. Harrison v. Warden, Maryland Penitentiary, 890 F.2d 676 (4th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 1951, 109 L.Ed.2d 314 (1990).

In a guilty plea situation, a defendant is foreclosed from attacking the admissions made at the plea hearing. His admissions may be accepted as conclusive unless he presents reasons for not so concluding. Normally, the defendant may only attack the voluntary, knowing and intelligent character of his plea by showing ineffective assistance of counsel. Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d 167 (4th Cir. 1981). In this situation, the Court uses the Strickland standard for prejudice. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, the Court must determine that but for counsel's errors the petitioner would have pled not guilty and insisted on a trial. Furthermore, a guilty plea breaks the chain of preceding events. Therefore, defendant may not raise independent claims of constitutional deprivations occurring prior to the plea but only the voluntary, knowing and intelligent character of the plea. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

In examining a guilty plea, the Court may accord great weight to the statements made on the record by a defendant. This is especially true when made under penalty of perjury and such statements carry a strong presumption of verity and erect an imposing barrier against collateral attack. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, at

a minimum, a defendant must provide a reasonable explanation for inconsistencies. Via v. Superintendent, Powhatan Correctional Ctr., 643 F.2d at 171. If he claims attorney misadvice, he must allege facts sufficient to show that but for the "misadvice," he would have pled not guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. at 60. Mere allegations of prejudice are insufficient. Key v. United States, 806 F.2d 133, 138 (7th Cir. 1986); United States v. Giardino, 797 F.2d 30, 32 (1st Cir. 1986).

In the instant case, using the guilty plea analogy, petitioner fails to meet this heavy burden. The linchpin of the claim arises out of his contention that he was incompetent at the time of sentencing. However, as decided previously, there is no substantial evidence giving any indication that this was the case. Instead, the record discloses that petitioner was well aware of his options. As demonstrated at the post-conviction hearing with the playing of one of the taped conversations between petitioner and his attorney (PCHT 179-204), petitioner was well aware of his options and the attorney's advice to present mitigating evidence. However, petitioner decided on a strategy to force the jury to make the hard decision of recommending death by making them question whether they were truly convinced that he in fact was guilty. Petitioner never requested that the jury simply recommend putting him to death. Instead, his statement was that if they thought he did it, then they should gas him.

This decision by petitioner was not made on the spur of the moment but in fact was a long standing life outlook which he had as

part of his belief system. Petitioner found it hard to believe that Buren Shinn lived after he shot him at close range and could not believe that his girlfriend "betrayed" him by turning state's evidence. A reading of his conversations with counsel (PCHT 174-204) indicates that he thought he had gotten away with the crime and found it difficult to accept that he might be convicted. This partially appeared to be his basis for challenging the jury as he did. Second, he did not want to spend a lifelong time in prison which he considered to be an unconscionable waste of life in violation of his life principles. (PCHT 184) Petitioner adopted a "keep people guessing" strategy. (PCHT 183) He directed his defense and the evidence shows his decisions were voluntarily, knowingly and intelligently made. He does not offer a reasonable explanation to conclude otherwise.

Petitioner now states that his attorney made an error by suggesting that if he were found guilty and were not put to death that he could receive a combined sentence of 180 years and this exaggerated the amount of time that petitioner could receive. (PCHT 180) However, the same Transcript shows that petitioner did not make his plans based on a 180-year sentence because he responded that he doubted that he could live 180 years. (PCHT 184) Rather, he was worried about even a 30-year sentence, stating that he would get out as an old man and would have wasted the prime of his life. (PCHT 193) The attorney's misadvice was not the basis for petitioner's actions.

Petitioner did not waive his sentencing hearing or his right to counsel, nor did counsel abandon him. The record before the state court (Tr. 759) shows that the trial court adequately determined that petitioner understood the sentencing procedure and had no questions about it, that he spoke to his attorney at least on five separate occasions, had thought about this for months, and made his own decision. The trial court made sufficient inquiry to find petitioner was making a voluntary, knowledgeable and intelligent choice.

The fact that petitioner's attorney acceded to petitioner's wishes in no way can be construed as an abandonment. Rather, his actions were akin to the retreat in Clozza v. Murray, 913 F.2d 1090 (4th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991), where counsel made such concessions as were appropriate by the evidence. In view of the extremely strong evidence of guilt and petitioner's desire to challenge the jury and his distaste for a long prison sentence, counsel's conduct could not be described as one of abandonment. Indeed, the strategy tended to play on the jury's reasonable apprehension of making a mistake. (Tr. 1025-1028)

This decision is further supported by the findings of the state court in ruling on the motion for appropriate relief. State court findings are presumed to be correct and entitled to deference. Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The trial court found that the attorney made an attempt to put in mitigating evidence in spite of petitioner's

instructions, that petitioner failed to show there was any relevant mitigating evidence not used, and the hearing was "constitutionally adequate to establish a basis for a reliable decision." State Court Order of July 1, 1987, at 12.

Petitioner's claims fail to show that he did not knowingly, intelligently and voluntarily make his decisions, that his decisions were uninformed or otherwise pressured or invalid, or that he was abandoned by his attorney. Therefore, petitioner's claims should be dismissed.

Claim VII - Ineffective Assistance of Counsel

Plaintiff raises five categories of ineffective assistance of counsel claims. Each one contains numerous points. Four of the contentions concern counsel's performance during trial. The final one involves counsel's handling of the appeal.

Before addressing the specific points, it will be helpful to discuss the legal standards applicable to trial errors. Petitioner must satisfy the two-prong standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show that the representation fell below objective standards of reasonableness. Second, he must show that as a result, petitioner suffered prejudice, meaning there is a reasonable probability that but for the error in the proceedings, the result would have been different. The Court indulges a strong presumption in favor of counsel's adequacy. Id. It may not second-guess strategic decisions made by the attorney and his client. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

In evaluating strategic decisions, the Court determines whether they are reasonable under all of the circumstances, not just with respect to the trial. The issue is whether the attorney is functioning as counsel. Williams v. Kelly, 816 F.2d 939 (4th Cir. 1987)(failure to move to strike or dismiss). The sixth amendment requires the attorney to act as a professional. Therefore, the attorney may not assist a client to present perjury. Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Some decisions, such as advice not to testify, are examples of those kinds of tactical decisions which may not be challenged so long as there is no coercion by the attorney. Hutchins v. Garrison, 724 F.2d 1425, 1436 (4th Cir. 1983), cert. denied, 464 U.S. 1065, 104 S.Ct. 750, 79 L.Ed.2d 207 (1984). Utilizing these parameters, the Court will examine the allegations of error, pretrial and at trial.

VII-A Pretrial Investigation

Petitioner alleges that his attorney committed error in the pretrial investigation, preparation and motion practice of the case. With respect to the investigation, petitioner claims that defense counsel failed to contact relatives, including his mother and father, and friends who could provide significant background information and character evidence for the trial and sentencing.

The affidavits of these witnesses are provided for the first time. None of these affiants appeared at petitioner's state post-conviction hearing. Petitioner fails to show good cause for this deficiency. Turning to the affidavits, there is no reason

petitioner's attorney should have known about any of them except Emily Long, who states that she attempted to contact petitioner's attorney, Jim Johnson. These people would purportedly be character witnesses saying that petitioner was helpful and honest, good at work, etc.

This issue was addressed at petitioner's state post-conviction relief hearing. There, the error was denominated as a failing to present mitigating evidence. At the hearing, it was revealed that petitioner's attorney, Mr. Jim Johnson, had practiced for eighteen years and was assisted by an associate who worked with him for seven years. Mr. Johnson was an extremely experienced criminal trial practitioner. (PCHT 131-33) Because of petitioner's elected trial strategy, he told his attorney he did not want his relatives to be called as witnesses. (PCHT 55) He further told his attorney that he was not close to anyone, including his parents, and this was because if he did anything illegal, it could create problems for him. (PCHT 54-59) (Petitioner apparently engaged in stealing as a general way of supporting himself. (PCHT 185))

The attorney conducted his own investigation, finding that petitioner was a private person who liked his own space and did not like to be confined. (PCHT 58) He talked with people who knew petitioner. Petitioner had a reputation for being a loner, a bragger, and a fence for handling stolen goods. (PCHT 59) Petitioner repeatedly told his attorney to either get a not guilty verdict or procure the death penalty. (PCHT 168) The attorney considered mitigating evidence that he could put up which

essentially would only indicate that petitioner was "a pretty good guy." (PCHT 170). He thought about using the parents and the usual sentimentality that goes therewith. However, he knew that negative factors necessarily would arise on cross-examination. (PCHT 170-71) Considering these matters, Mr. Johnson developed his case and attempted to find mitigation evidence in the guilt phase of the trial through cross-examination. (PCHT 65-67, 173, 234-35) He realized that putting on witnesses at sentencing would likely open the door to other problems, particularly when the client has decided to challenge the jury by asking for the death penalty. Id. This strategy does not reveal deficient representation.

The state post-conviction court found that counsel "made extensive investigation into the facts and circumstances" in order to get mitigating evidence, including investigation of petitioner's past. It concluded counsel sufficiently presented mitigating evidence to the jury to make the sentencing hearing adequate and that counsel was not ineffective. This Court is not bound by that ultimate determination because competence of counsel claims are mixed questions of law and fact. Knight v. Johnson, 699 F.2d 162 (4th Cir.), cert. denied, 464 U.S. 832, 104 S.Ct. 112, 78 L.Ed.2d 113 (1983). However, the Court may and does accept the findings of fact. Mason v. Procunier, 748 F.2d 852 (4th Cir. 1984), cert. denied, 471 U.S. 1009, 105 S.Ct. 1876, 85 L.Ed.2d 168 (1985). The facts do not show deficient representation through inadequate investigation or prejudice to petitioner. Thus, the claim is without merit.

In addition, the state court specifically noted that petitioner failed to show that any mitigating evidence was available. Therefore, he could not show he was entitled to relief. This finding may be accepted. Petitioner fails to show that the state hearing on this issue was not full and fair and that he should be allowed to introduce new evidence. But, even when the Court considers these "new evidence" affidavits, petitioner is still not entitled to relief.

Counsel does not necessarily act ineffectively by failing to follow up on all avenues of investigation. See Ballou v. Booker, 777 F.2d 910 (4th Cir. 1985)(defendant admits to crime). Here, counsel is faulted for not checking plaintiff's school records, etc., and friends. However, petitioner indicated that he did not want his people involved. Counsel made an independent investigation to check on petitioner's reputation among people who knew him and found it to be a mixed bag. While petitioner now presents affidavits wherein people point out his good characteristics, counsel was well aware that such witnesses could in fact be damaging through cross-examination. Counsel is also criticized for failing to "educate" petitioner as to the importance of developing a social history, but that matter has been discussed and rejected previously. Finally, the claim that counsel failed to locate documentary evidence of "past psychological records, school records, social service records and other records" is conclusory. Considering all of these circumstances, it cannot be said that counsel failed to make an adequate investigation even if one were

to consider the new affidavits. Counsel did make an investigation and came forward with much of the same type of evidence as is presented now. He decided not to use it, which was appropriate since witnesses, while they might be helpful, could also hurt the case. Tompa v. Commonwealth of Virginia, 331 F.2d 552 (4th Cir. 1964). For example, petitioner points out that one witness indicated petitioner was rarely without his glasses, yet the composite photo of the suspect prepared by the police did not show glasses. First, there was no question but that petitioner committed the crime in this case. Second, as respondent points out, pursuing such evidence may have provided explanation for Mr. Shinn's testimony that his assailant kept blinking his eyes. (Tr. 606) In conclusion, petitioner fails to establish either counsel errors or a likelihood of prejudice.

Turning to the motion part of the trial, petitioner claims that counsel failed to move for the appointment of a psychiatrist. This has been rejected previously and will not be discussed further. Next, petitioner alleges that counsel was ineffective for failing to make a motion for the appointment of an investigator to assist him. The claim is conclusory. O'Bremski v. Maass, 915 F.2d 418 (9th Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 986, 112 L.Ed.2d 1070 (1991); Riley v. Lockhart, 726 F.2d 421 (8th Cir. 1984). It is true that petitioner was contemplating a perjured alibi defense (PCHT 162-64) but the attorney of course could not use the investigator for that purpose. The attorney had already discovered the same type of sentencing mitigation evidence

petitioner now presents to the Court. Counsel made his own investigation for the change of venue motion and did not need an investigator as was revealed at the state post-conviction hearing and will be discussed later. Petitioner fails to show the counsel's decisions constituted error or that he was prejudiced.

VII-B Jury Selection

Petitioner faults his counsel during the jury selection voir dire with respect to issues of pretrial publicity, and the jury's understanding of the reasonable doubt standard, and its ability to consider life imprisonment and background information.

Petitioner contends that counsel failed to effectively inquire of the jurors as to the extent of their exposure to pretrial publicity. (emphasis added) Counsel allegedly failed to ask probing background questions designed to uncover prejudice and the jurors' understanding and acceptance of the concepts of "burden of proof" and "reasonable doubt." (emphasis added) Next, petitioner alleges that counsel's questions to the jurors concerning the death penalty were inadequate to obtain their views, that he failed to question jurors individually about the death penalty, and failed to see whether they could vote for a life sentence or understood the concepts of mitigation and parole.

Counsel is also faulted for not examining the jury and correcting misconceptions it might have about parole eligibility. Petitioner alleges that counsel failed to challenge for cause,

jurors who asserted the death penalty should be automatic.[5] Petitioner scores counsel for not using up all of his peremptory challenges in order to preserve claims concerning the death qualification of the jurors and change of venue issues. Finally, he complains that counsel distanced himself from petitioner.

A review of the jury voir dire fails to substantiate petitioner's claims. His assertion that the attorney tried to distance himself by stating that he had a difficult thing to do by representing the defendant is inaccurate and taken out of context. (JS** 68) A review of the record indicates that counsel merely emphasized the difficult nature of the task involved for all participants.

The suggestion that counsel should have exercised all his peremptory challenges to preserve the issue for appeal also is frivolous. At the state post-conviction hearing, the experienced trial counsel explained that one does not run out your jurors with peremptory challenges when he is satisfied with the jury. (PCHT 208-209) Petitioner's contention might be effective appellate strategy but it is also unsound trial advocacy. As for the other claims, which concern the questions posed to the jury, they are

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[5] Petitioner failed to provide a transcript cite for paragraph 120 in which this allegation is made. The Court ordered petitioner to provide additional transcript citations for matters which he wished the Court to consider in his petition. Petitioner filed a supplement on September 23, 1991. It did not contain a transcript citation for this paragraph. He has not otherwise directed the Court to the record. Therefore, the Court will not consider the issue further. It may be noted that a similar contention was rejected in Stamper v. Muncie, 944 F.2d 170 (4th Cir. 1991).

** Jury Selection Transcript.

speculative and conclusory and, therefore, without merit. O'Bremski v. Maass, 925 F.2d 418; Riley v. Lockhart, 726 F.2d 421. Petitioner does not show either cause or prejudice as to any of them.

VII-C Guilt Phase

Petitioner's claims concerning matters during the guilt phase are wholly without merit. As revealed during the state post-conviction hearing, petitioner had attempted to procure a perjurious alibi defense but counsel would not allow it. The evidence of petitioner's guilt was and is clear. Against this backdrop, petitioner now faults counsel for failing to make an opening statement to the jury, failing to cross-examine Phyllis Soden, petitioner's girlfriend, in an effective manner, and for failing to object to the identification procedure with respect to petitioner's automobile. Finally, counsel is scored for failing to object to the prosecutor's closing arguments.

The allegations concerning the failure to make an opening statement and inadequate cross-examination do not merit relief absent petitioner showing that the result would have been different. Sawyer v. Butler, 848 F.2d 582, 590 (5th Cir. 1988), aff'd en banc, 881 F.2d 1273 (5th Cir. 1989), aff'd on other grounds, ____ U.S. ____, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Sawyer involved a case where counsel waived closing argument. Here, counsel only waived opening argument and in light of the overwhelming evidence, petitioner cannot show that an opening statement would have changed the result.

The cross-examination of Phyllis Soden is said to be ineffective for failing to explore a prior somewhat inconsistent statement. However, the matter was covered on direct examination. (Tr. 389-93) Her later statement was the subject of cross-examination. (Tr. 424-26) In any event, the statement was evidently placed into evidence (Tr. 555-56) and one discrepancy was noted (Tr. 567). Additionally, in light of the strong evidence of guilt, petitioner cannot show prejudice.

Next, petitioner alleges that counsel should have objected to the impermissibly suggestive identification procedures employed by law enforcement officers with respect to witness Joy Cline's identifying petitioner's car. Petitioner points out that Cline indicated, that before she went to an impound lot to view petitioner's car, an officer showed her a picture of petitioner's car and said it belonged to petitioner. (Tr. 323) Petitioner alleges that counsel should have requested an identification hearing to exclude the identification based on factors such as opportunity to view, the witness' degree of attention, accuracy of prior description, level of certainty and the time between the crime and the confrontation. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The Fourth Circuit has determined that Wade type challenges do not apply to identification of objects such as motor vehicles as opposed to persons. Inge v. Procunier, 758 F.2d 1010 (4th Cir.),

cert. denied, 474 U.S. 833, 106 S.Ct. 104, 88 L.Ed.2d 85 (1985). In any event, petitioner could not show prejudice. It is obvious the witness had a clear picture of the car in her mind. She knew its color, the fact that it had a dirt spot, that a white male with a beard was driving it, and that it had a bumper sticker on the back. (Tr. 308-25) She was the one who contacted law enforcement officers after seeing the evening news. While the officer showed her a black and white photograph of petitioner's car, he did not say it was the car used by the murderer but only that he wanted to see if she could identify it as the one that had tried to run her off the road around the time and place of the murder. (Tr. 323) Under these circumstances, petitioner's counsel cross-examined as effectively as possible. (Tr. 316-325) Petitioner also cannot show prejudice.

Finally, petitioner criticizes counsel for not objecting to allegedly unconstitutional statements by the prosecutor. These are:

(1) expression of personal belief in petitioner's guilt by rhetorically saying after the reading of each of the three charges, "and I say to you of that he is guilty" (Tr. 943);

(2) the statement that after petitioner had been targeted as a possible defendant, he allowed law enforcement officers take his photograph and then bragged to his girlfriend that he could not be identified because the elder Shinn, if not dead, was then at least a vegetable, and the

prosecutor commented about the "gall" of petitioner's "cooperation" at that time (Tr. 963);

(3) that Wayne Shinn's house was not his castle but rather "his crucifixion block" (Tr. 981);

(4) that he was a little sickened to think that defendants are tried "in the beautiful courtroom like this and their victims are shot down and lay in their own blood and vomit on some ground somewhere" (Tr. 981); and,

(5) that only the jury could vote on a defendant's guilt and in effect, asked them "why don't they do something about it?" (Tr. 989)

At the post-conviction hearing, counsel indicated he did not object to the prosecutor's argument because when prosecutors get really cranked up, it often hurts them rather than helps them. (PCHT 206) He did not want to get into a situation of each side making objections so that he might argue also without interruption. (PCHT 207) Finally, he knew good arguments from bad arguments and did not think that the jury argument in this case would have resulted in a new trial by order from the North Carolina Supreme Court. Id. It is quite obvious that the attorney made a strategic decision which this Court should be reluctant to second-guess. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Petitioner fails to show that the argument in this case was so abusive or extravagant so as to justify a new trial under state law. See generally 4 STRONG'S NORTH CAROLINA INDEX 3D Criminal Law

SS 102.6-102.13 (1976). Also, counsel's failure to object did not prejudice petitioner.

In determining whether a prosecutor's argument violates due process and deprives a defendant of a fair trial, the Court must look to see whether he manipulated or misstated evidence or implicated other rights. Darden v. Wainwright, 477 U.S. 168. Here, there is no indication that the remarks violated petitioner's right to a fair trial. The Court may look at the degree the remarks may have misled or prejudiced the jury, whether they were isolated or extensive, the strength of the case, and whether the remarks were deliberate. United States v. Harrison, 716 F.2d 1050 (4th Cir. 1983), cert. denied, 466 U.S. 972, 104 S.Ct. 2345, 80 L.Ed.2d 819 (1984).

The remarks here did not infringe on any particular constitutional right, such as petitioner not taking the witness stand. Some remarks, such as the prosecutor suggesting that petitioner was guilty or that petitioner's feigned cooperation was galling or that only the jury could do something about the situation, are fair comment. The argument that the victim's house was not a castle but his crucifixion block is somewhat colorful and not unexpected in a heated trial involving a passionate cause. The most egregious remark may have been the comment that petitioner was being tried in a nice courtroom. However, that remark was isolated and in no way would have misled the jury from its duty, particularly since it was made in the heat of argument and the case, even at sentencing, was a strong one. Therefore, petitioner

fails to show that counsel violated his duty, much less that petitioner suffered cognizable prejudice.

VII-D Sentencing Phase

Petitioner alleges counsel was ineffective during the sentencing phase of the trial. Some of these matters have already been covered and will not be extensively discussed again. Thus, petitioner now alleges that his counsel (1) abandoned him so that he effectively had to proceed pro se; (2) failed to investigate and develop mitigating evidence and present any evidence at the sentencing phase; and (3) failed to develop evidence to show that petitioner's request was "suicidal" and irrational and argue the presence of mitigating circumstances, including petitioner's incompetency. Finally, counsel is criticized again for not developing psychological evidence of petitioner's incompetency.

The Court has already found that petitioner was not incompetent and that counsel had a duty to represent petitioner and not substitute his own beliefs for that of petitioner. Petitioner's counsel's strategy was to develop whatever mitigating circumstances he could during the guilt phase of the trial. Petitioner, in fact, acknowledges that substantial evidence was developed this way. See Claim I, ¶¶ 38-39. Petitioner sought to challenge the jury with his innocence at sentencing and petitioner's counsel carried forth that strategy as effectively as possible. Hayes v. Lockhart, 852 F.2d 339 (8th Cir. 1988), rev'd on other grounds, 881 F.2d 1451 (8th Cir. 1989)(petitioner's own request). The strategy employed by counsel was in large part

dictated by his client and counsel cannot be faulted for following that strategy. Compare and contrast Card v. Dugger, 911 F.2d 1494. A defendant may not block his lawyer's efforts and then later complain of ineffectiveness. Autry v. McKaskle, 727 F.2d at 361. Petitioner fails to satisfy either prong of the Strickland test.

Next, petitioner objects to counsel's failure to object to six statements made in the sentencing jury arguments. They are:

(1) In anticipating that defense counsel may argue life is precious, the prosecutor asked the jury to "recall that Wayne Shinn found it so." (Tr. 1016)

(2) While petitioner has constitutional rights, a citizen has the right to be free from being assaulted and shot and to be safe in his home. (Tr. 1017)

(3) While defendant had two attorneys, Wayne Shinn "had no attorney sitting next to him." (Tr. 1018)

(4) In explaining why the state only selected two aggravating circumstances, because they were ones found in the statute, the prosecutor asked whether the jury wondered why, when there are so many other facts that made this "such a heinous crime" that the state limited itself to the two statutory circumstances. (Tr. 1013)

(5) In reminding the jury of this country's legal history and respect for law, the prosecutor speculated that in many countries after a murder conviction execution would be summary. (Tr. 1021)

(6) In discussing the death penalty, the prosecutor indicated that "we all agreed that we believe in the death penalty" and then went on to recall how everyone agreed it may not be imposed in all cases but that the circumstances of this case warranted it. (Tr. 1022)

Again, petitioner fails to show that the error in failing to object to the jury arguments was so serious so as to render his counsel's assistance ineffective. The only statement coming close to being so egregious so as to infringe upon a specific constitutional right or mislead the jury would be the comment about petitioner having an attorney but the victim did not. Petitioner fails to show counsel's failure to object was ineffective and would have merited relief under North Carolina law. Even if he did, he fails to meet the prejudice prong of the Strickland v. Washington test. Strickland v. Washington, 466 U.S. 668.

In Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(en banc), further opinion, 809 F.2d 700 (11th Cir. 1987), the court held that the prejudice standard of the Strickland test was the appropriate one to apply in determining whether prosecutorial argument per se violated the due process clause. The court pointed out that in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the Supreme Court determined that improper prosecutorial argument must be examined in the entire context of the judicial proceeding. The issue is not whether a particular remark is unfair but whether it rendered the entire trial unfair. Therefore, isolated or ambiguous or unintentional remarks will be

viewed with some lenity. Also, curative instructions may mitigate any damage. In Brooks v. Kemp, 762 F.2d at 1401, the court determined that the petitioner must show that there is a reasonable probability that in absence of the improper remarks the result may have been different.

Under the facts of this case, petitioner cannot meet that standard. The evidence of guilt was overwhelming and petitioner decided to challenge the jury at sentencing to give him the death penalty if they did not have a doubt about his guilt. The crime was an aggravated one under the circumstances. It is not unfair for the prosecutor to remind the jury that the killing was an execution style one and that the victim's rights were obliterated by the crime. Brooks v. Kemp, 762 F.2d at 1411. Other remarks were superfluous. The remark concerning the attorney was perhaps best left unsaid, but under the circumstances cannot be said to have deprived petitioner of a fair trial. It was a brief comment and did not seek to criticize petitioner for having an attorney. Rather, it was said in anticipation of rebuttal by petitioner's counsel. It appears to have been an inappropriate, unartful way of indicating that petitioner's attorney would have the final argument.

Petitioner's attorney is faulted for failing to request four instructions. Counsel is faulted for not requesting that the jury could consider sympathy. Petitioner fails to show this instruction reflected the law of North Carolina. In any event, the trial judge instructed the jurors that they might consider any other

circumstance as mitigating and any aspect of defendant's character or reputation or circumstance. (Tr. 788) Petitioner fails to meet either prong of the Strickland test. The same is true with respect to the claim that counsel erred in not requesting instructions on specific non-statutory mitigating circumstances. This is a conclusory claim in addition. Riley v. Lockhart 726 F.2d 421.

Counsel allegedly should have requested that the jury be instructed that it had the option of imposing a life sentence on the basis of mitigating evidence irrespective of their weighing of aggravating and mitigating factors. Petitioner cannot show ineffective assistance of counsel because at least at the time, that was an incorrect statement of North Carolina law. State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982), cert. denied, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). See also Discussion at Claim XIV, infra. Counsel is also faulted for not requesting that the jurors be informed that they need not be unanimous with respect to any particular mitigating factor in order for each individual to utilize the balancing test. The Court has already determined that the core of this issue may not be retroactively applied. More importantly, the instruction in this case passes constitutional muster. Petitioner fails to meet either prong of the Strickland test.

Finally, petitioner alleges counsel was ineffective for not objecting to the instruction concerning the aggravating circumstance of avoiding or preventing a lawful arrest. The Court finds this claim to be conclusory and speculative and may be denied

on this basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. As respondent points out, this instruction has been upheld as constitutional in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), and State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981), cert. denied, 456 U.S. 932, 102 S.Ct. 1985, 72 L.Ed.2d 450 (1982). Therefore, petitioner was not under a duty to object to the instruction. Thomas v. Lynaugh, 812 F.2d 225 (5th Cir. 1987), cert. denied, 484 U.S. 842, 108 S.Ct. 132, 98 L.Ed.2d 89 (1987).

Counsel allegedly erred in failing to object to the instruction informing the jury that after they found the aggravating circumstances outweighed the mitigating, that it would be their "duty to recommend that defendant be sentenced to death." (Tr. 784) Such an instruction does not violate either the United States Constitution or the law of North Carolina. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982). Petitioner fails to meet either prong of the Strickland test.

Counsel is last criticized for not requesting an instruction clearly defining the nature, scope and function of mitigation to the penalty phase. This contention is speculative and conclusory and may be dismissed on that basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. In any event, the trial judge's instructions were more than adequate. (Tr. 780-81) Petitioner, again, fails to sustain his claim.

VII-E Ineffective Representation on Direct Appeal

The due process clause of the fourteenth amendment guarantees effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, an indigent does not have a right to compel his attorney to argue every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). In order to obtain relief, petitioner must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668.

When, as here, counsel is charged with failing to raise an issue on appeal which results in it being procedurally defaulted under state law, the petitioner must then satisfy the cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). However, counsel's deliberate decision to present issues in a different way or to weed out weaker arguments in order to emphasize the stronger ones is the antithesis of cause under either the Wainwright or Strickland standards. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Griffen v. Aiken, 775 F.2d 1226 (4th Cir. 1985), cert. denied, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986). Courts should not second-guess the professional judgments of counsel, and a petitioner would also have to show prejudice. Griffen v. Aiken, 775 F.2d 1226. Therefore, the refusal to raise an appellate claim does not give call for any special review. In cases such as the instant one when the evidence is strong and the appellant point is weak to marginal, no error results. Smith v. State of S.C., 882

F.2d 895 (4th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 843, 107 L.Ed.2d 838 (1990).

Utilizing these standards, petitioner is not entitled to relief on some of his claims because he cannot show either cause or prejudice as demonstrated in the previous or subsequent discussions. These claims are the following:

(1) Failure to assert that the aggravating circumstances of avoiding arrest or to escape was vague and over broad (discussed earlier in Claim VII-D).

(2) Failure to raise the denial of the motion for change of venue and special venire (discussed later in Claim X).

(3) Failure to raise a claim that three prospective jurors were excused even though qualified (discussed later in Claim XV).

(4) Failure to raise petitioner's absence from critical stages at the pretrial and trial stage (discussed later in Claim XI).

(5) Failure to brief the issue about Ms. Cline's allegedly impermissible suggestive out-of-court identification of a motor vehicle (discussed earlier in Claim VII-C).

(6) Failure to raise the issue of the trial court's limitations on petitioner's impeachment and/or mitigation evidence (discussed later in Claim XII(2)).

(7) Failure to appeal the deficiencies of the instructions (discussed in Claim VII-D).

(8) Failure to raise the issue of prosecutorial misconduct in sentencing argument (discussed in Claims VII-D and XII).

(9) Failure to raise the issue that the death sentence was disproportionate and the product of passion, prejudice or arbitrary factors in that petitioner was incompetent to waive reliable sentencing hearing because of his "suicidal request" (discussed in Claims II-VI, IX).

These claims which have been or will be discussed do not raise meritorious issues. Even if petitioner could show either cause or deficient representation, he cannot show prejudice.

The other claims simply do not merit relief. Thus, petitioner claims there was insufficient evidence to support the aggravating factor that he committed the murder in order to avoid apprehension. However, the record shows that he killed to avoid apprehension. (Tr. 366, 377)

Petitioner asserts that counsel should have argued that it was error to hold an off-the-record in-chambers conference concerning the cross-examination of decedent's wife, Mrs. Wayne Shinn. However, he fails to disclose any prejudice.

Next, petitioner claims that it was error for counsel not to raise an objection when the decedent's brother, Jerry Shinn, was allowed to state that he told the deputy there had been a robbery or break in at his brother's house from what he was told by his father. (Tr. 81-83) However, even if this statement were inadmissible hearsay, which is doubtful, its admission was not cognizably prejudicial.

Petitioner alleges counsel should have argued that the repeated references by witnesses to his client as "Wild Man" was error. Respondent shows that witnesses volunteered, perhaps seventeen times (Tr. 373-496), that they knew petitioner by the name of Wild Man and so called him. (Answer at 48) The state at one time asked a witness if petitioner had any nicknames. The witness answered it was "Wild Man." (Tr. 507) Cross-examination revealed that other people, who frequented that place of business, also had strange nicknames which did not necessarily mean anything. (Tr. 508) Petitioner was in fact known as "Wild Man." He fails to show that any appeal of the issue had merit, much less that he suffered prejudice by want of appeal.

Next, petitioner alleges counsel should have raised as error, three inappropriate references during witness testimony. First, petitioner's girlfriend, Phyllis Soden, testified that petitioner told her that he was not going back to prison (Tr. 377). Petitioner claims this was error because petitioner never had been to prison and instead, served his time in a county jail. However, the question is what petitioner stated. It was a matter for cross-examination, but more likely was best left alone.

Petitioner objects because Ms. Soden also testified that he may have known something about the law since he had been involved in it. (Tr. 480) Petitioner's objection is merely argumentative, like the prior one.

Last in this series, petitioner claims that it was error when Ms. Soden related how petitioner was happy because he thought that

the father Buren Shinn was a vegetable and his girlfriend was helping him by giving the police hell. He told Ms. Soden that the police wanted him to take a lie detector test but he would not because it caused a heart murmur. (Tr. 394) All of these statements are clearly admissible as to what petitioner told Ms. Soden and relevant to both the guilt and penalty phase of the trial. Nor has petitioner shown prejudice.

Petitioner next alleges that the trial counsel should have raised the trial court's error in prohibiting him from developing evidence on cross-examination. Like the prior claims, petitioner fails to show that the action taken by the trial judge constituted error, much less that the failure to raise this on appeal violated petitioner's constitutional rights.

The first such error was that the trial judge sustained an objection concerning Ms. Soden's prostitution work about whether she was paid a straight salary or a commission. (Tr. 430) Ample evidence of Ms. Soden's situation was introduced without the need to explore business details. Next, the court is faulted for sustaining an objection of a deputy sheriff who also knew petitioner as a work employee. (Tr. 571) The court sustained an objection as to whether petitioner gave anyone trouble. The question was irrelevant. Last, petitioner complains because the trial court foreclosed cross-examination as to whether the department intended to charge Ms. Soden with any crimes. (Tr. 568-72) While it might have been appropriate to see whether any promises had been made to her, under the circumstances of this

case, sustaining the objection was not error. Ms. Soden explained her involvement in knowing about the crime and in her prostitution. The foreclosure of further inquiry was not error, much less an error by counsel in not raising these matters on appeal.

Petitioner complains that counsel should have appealed the trial court's failure to hold a charge conference prior to the guilty phase instructions. Petitioner fails to show prejudice and, therefore, the claim is without merit. The same is true to the extent petitioner claims that counsel did not argue that petitioner's death sentence was disproportionate to others similarly situated or the product of passion, prejudice or arbitrary factors. The claim is also conclusory. Riley v. Lockhart, 726 F.2d 421. He complains that counsel failed to appeal the removal of jurors because of their general reservation to the death penalty. He fails to provide a record citation and the claim may be dismissed for that reason. Also, the record does not support such a claim. See also this Opinion p. 68, n.5. In conclusion, petitioner's request for relief on Claim VII should be denied.

Claim VIII - Instruction Involving Malice as Constituting Invalid Mandatory Presumption

Petitioner alleges that one part of the trial judge's instruction created an unconstitutionally mandatory presumption. He points to the instruction where the Court charged that, if the jury found beyond a reasonable doubt that petitioner killed his victim, the law implied that the killing was unlawful and was done with malice. (Tr. 739, 740) Petitioner alleges that a reasonable

juror could have interpreted the instruction as requiring a mandatory inference of malice.

Respondent retorts that this claim is barred by Teague v. Lane, 489 U.S. 288, since it relies on Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). However, Sandstrom was decided in 1979 and Francis on April 29, 1985. Both decisions, therefore, arose prior to May 20, 1985 when petitioner's conviction became final. Also, Francis has been said to simply be an application of Sandstrom. Yates v. Aiken, 484 U.S. 211, 216-17, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). Petitioner's claim does not seek to establish a new rule by his contention. Notwithstanding, petitioner's claim must be dismissed on the merits.

The actual language used by the state court did not create a mandatory presumption or inference. Instead, the language only indicated that when certain acts occurred there was an implication that certain facts were established. To imply is far different from presuming. United States v. Love, 767 F.2d 1052, 1059 (4th Cir. 1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 890 (1986)(to infer). In Rook v. Rice, 783 F.2d 401, 405 (4th Cir.), cert. denied, 478 U.S. 1022, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986), the court examined this same instruction and found that it passed constitutional muster. Moreover, in this case, unlike others, there is no question that petitioner did not act in the heat of passion or in self-defense. Therefore, if petitioner in

fact committed the act, and there is no serious dispute on that issue, then he did so deliberately and intentionally. Under these circumstances, there could be no error in the instruction.

Finally, and alternatively, in this case the brutality of the act and overwhelming evidence of guilt clearly established intent. Therefore, petitioner's failure to object to the instruction waived any error and also the failure to object to the instruction would be harmless. Waye v. Townley, 871 F.2d 18 (4th Cir. 1989), cert. denied, 491 U.S. 910, 109 S.Ct. 3202, 105 L.Ed.2d 710 (1989). To the extent petitioner would claim that his trial attorney committed error by failing to object to the instruction, this tact also fails for inability to show prejudice because of the overwhelming, clear evidence of guilt. Id.; Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991). Therefore, this claim for relief should be denied.

Claim IX - Death Penalty Statute Unconstitutional on its Face

Petitioner argues that the death penalty statute, N.C.G.S. § 15A-2000, et seq., is unconstitutional because there are no provisions to guide prosecutorial judgment on when to seek an indictment for first-degree murder or when to seek the death penalty in a particular case. The prosecutor testified that he had discretion in selecting his cases. (JS 6-10)

Petitioner fails to state a claim for relief. It is true that a prosecutor may not engage in selective prosecution where a person is singled out for bad faith motives, such as race, religion or the exercise of a constitutional right. United States v. Greenwood, 796 F.2d 49 (4th Cir. 1986). However, there is nothing which

indicates that petitioner's right was violated in this regard. Therefore, petitioner must and does argue that because the prosecutor could engage in discretionary selection of cases, this could result in discriminatory selection. On this basis he claims that the statute is unconstitutional. However, merely because the statute does not explicitly forbid the obvious, that does not mean it is unconstitutional.

Selecting cases for prosecution and selecting death penalty cases present the same problems of evaluating the strength of the case, whether the elements can be satisfied, and other case bound factors which will vary with each case. Such discretion does not, at present violate Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), by creating a substantial risk that the death penalty will be imposed arbitrarily or capriciously. Petitioner fails to show that the Supreme Court has found prosecutorial discretion leads to arbitrary or capricious imposition of the death penalty. Therefore, petitioner seeks to establish a new rule which he may not do in this petition for post-conviction relief. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

X - Denial of Motion for Change of Venue

Petitioner claims that the trial court's denial of his motion for a change of venue and special venire violated his right to due process of law. Petitioner cites the massive publicity in petitioner's case with newspaper headlines and television and radio

coverage. He attaches all of the newspaper clippings he feels are relevant.

Petitioner acknowledges that his trial and appellate counsel filed the appropriate pretrial motion but faults him for not renewing it after the jury was selected. Petitioner charges that the pretrial publicity in this community was massive and saturated it. He asserts that most of the jurors knew about the case prior to trial and some of them had formed opinions about the case. Petitioner claims that in this case prejudice must be presumed.

A review of the record fails to support petitioner's contention. The matter was thoroughly explored at the post-conviction hearing. The post-conviction court found trial counsel made an adequate investigation and presentation of the issue and did not appeal it due to its lack of merit. These findings are supported by the record, along with the decision that the denial of the change of venue motion did not violate petitioner's right to a fair trial. The trial court's finding of impartiality is one of historical fact and entitled to deference. Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984).

Counsel was an experienced attorney and state legislator. He knew his county well and conducted an investigation prior to trial. It is true that the victim and his family were well liked and there was strong feeling initially that someone should be punished. However, this feeling mellowed (PCHT 32). Notwithstanding, counsel decided to press the motion anyway to be sure. Id.

Counsel did not call an expert since he had tried many criminal cases in the county and was attuned to the feelings of the citizens. (PCHT 33) Counsel put in evidence of news media publicity. He did not put in evidence of word of mouth publicity because his own investigation showed there was not evidence to support that position. (PCHT 35-36) Counsel did not selectively call people who indicated petitioner could not get a fair trial since more people were indicating he could get a fair trial. (PCHT 41-42) Furthermore, counsel was satisfied with the jury that he got. Id. He felt this jury gave him the best chance of obtaining a fair trial. (PCHT 79-82) He understood he could have simply arbitrarily exercised peremptory challenges as now argued by petitioner, but chose not to employ such a course of action which would jeopardize the trial simply for the sake of making an unpromising appellate argument. Id.

In order to show that he was denied a fair trial and impartial jury because of adverse pretrial publicity, the petitioner has the burden of demonstrating actual identifiable prejudice attributable to the publicity on the part of a member or members of his jury at the time of trial. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Hargrave v. Landon, 584 F. Supp. 302, 305 (E.D. Va.), aff'd, 751 F.2d 379 (4th Cir. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985); United States v. Wilson, 715 F.2d 1164, 1168 (7th Cir.), cert. denied, 464 U.S. 986, 104 S.Ct. 434, 78 L.Ed.2d 366 (1983). To meet this burden, petitioner must show, based on a totality of the circumstances, the

actual existence of an opinion eradicating the jurors' presumed impartiality. Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Hargrave v. Landon, 584 F. Supp. 302; United States v. Pomponio, 563 F.2d 659, 665 n.9 (4th Cir. 1977), cert. denied, 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.2d 538 (1978)(presumed impartiality). Merely showing that the jurors were familiar with the allegedly prejudicial news articles cannot establish prejudice because it is not required that jurors be totally ignorant of the facts and issues involved. Irvin v. Dowd, 366 U.S. at 722; United States v. Wilson, 715 F.2d 1164.

Likewise, the mere existence of a pre-conceived notion as to the guilt or innocence of the accused, without more, is insufficient to rebut the presumption of impartiality. The law finds it sufficient if the juror can lay aside his notions or opinion and render a verdict based solely on the evidence at trial. Irvin v. Dowd, 366 U.S. at 723.

Applying the above principles to the facts of this case, petitioner fails to meet his burden of showing actual prejudice. His only citation is to two prospective jurors, Gary Kee and Faye Gaskey, who were employed as barbers and beauticians. They stated that people were expressing their opinions as to petitioner's guilt. Even combined with petitioner's allegations of fact, this does not show evidence of prejudice. See Petition at ¶ 201, p. 54. Petitioner notes that only one juror had not heard of the case prior to the trial. However, only seventeen had participated in conversations about the case and only twelve had heard that people

had asserted that petitioner had committed the crimes. Id. Only a "number" had formed opinions about the case. Id. Respondent points out that the defense only had to use seven out of its peremptory challenges. All jurors were able to affirm their impartiality. The trial court's rulings are entitled to a presumption of correctness. Patton v. Yount, 467 U.S. 1025. Petitioner fails to show actual prejudice or impartiality.

The exception to the approach of requiring a petitioner to show actual juror prejudice is where the pretrial publicity is so intense, prejudicial, inflammatory and pervasive that prejudicial juror bias may be presumed. Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Rideau v. Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Mayola v. Alabama, 623 F.2d 992, 996-97 (5th Cir. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981). While some courts appear to speculate that the petitioner need not show any of the jurors impaneled or the venire were actually exposed to the publicity, in practice, relief under this theory has rarely been granted.

Extensive knowledge of the crimes or putative criminal is not sufficient by itself to render a trial unfair. The petitioner must show a trial atmosphere utterly corrupted by press coverage. Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Mayola v. Alabama, 623 F.2d at 997. Comparing the news articles submitted by petitioner with the relevant case law, the

Court finds petitioner's argument that prejudice should be presumed is also without merit.

As a comparison, in the three foundation cases cited above in which the Supreme Court discussed publicity as being presumptively prejudicial, the publicity was shocking. In Rideau, the only pretrial publicity case, a twenty minute film of defendant's confession under police interrogation was broadcast three times by a local television station. In Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), a circus atmosphere developed which included the press being allowed to sit within the bar and to overrun it with television equipment. Finally, in Sheppard, there was a background of extremely inflammatory publicity, as well as the courthouse given over to accommodate the public's appetite for a carnival. See Murphy v. Florida, 421 U.S. at 798-99. None of these circumstances existed at the time of petitioner's trial.

While petitioner claims that the pretrial publicity was widespread, visible and prejudicial, the facts fail to reveal this to be the case. The publicity was initially heavy but petitioner's trial was six months later. While there were news articles and editorials, the articles were mostly factual in nature. Moreover the Daly Independent Newspaper, which serves the area, had Lisa Green's picture on the front page of the January 7, 1981 edition along with her claim of petitioner's innocence and alibi. (Tr. at 47) The newspaper and local news directors testified about substantial publicity but could not say that it would be difficult to get an impartial jury.

Petitioner fails to show that the news coverage so saturated and tainted the county that any subsequent proceeding necessarily would have been prejudicial. In addition to the articles being mainly factual, petitioner fails to point out evidence of grossly inflammatory coverage. The articles certainly criticized criminal acts, as they should, but strong and appropriate words are not evidence of inflammatory prejudice. Petitioner's counsel's investigation corroborates lack of inflammatory publicity, and corroborates a decision that there was neither presumed nor actual prejudicial pretrial publicity in this case. Petitioner's claim for relief in this count should be denied.

Claim XI - Petitioner's Absence at Critical Stages During the Trial

Petitioner contends that his constitutional right to be present at all critical stages of the trial was violated in four instances. On May 21, 1981 petitioner was apparently not brought into the trial until the argument and rulings were made on several pretrial motions. (JS 56) Prior to that, counsel argued and the court ruled on various motions. Counsel raised the question that the death penalty was facially invalid because of the discretion given to the prosecutor in selecting cases. The prosecutor testified that he indeed did exercise discretion. The motion was denied. Counsel requested that the jurors be sequestered prior to and after the jury selection which was granted. (JS 21-22) The court also denied restriction on public attendance at, and media coverage of, the trial. The judge permitted the consolidation of the cases against petitioner.

Petitioner also was initially not present on May 26, 1981 when the court instructed the jury venire, gave them their oath and apparently excused two jurors at his discretion. Third, petitioner was not present at bench conferences when two prospective jurors (Moose and Horton) were excused at the court's discretion. (JS 48-49, JS 55) This occurred outside of the hearing of petitioner and counsel because the excuses were personal or embarrassing.

Finally, petitioner alleges that the court communicated ex parte with a juror when the judge indicated to a juror that because of the recess prior to trial and the juror's schedule, the juror could call the judge's residence to ask questions about the scheduling of petitioner's trial. (JS 439-41) There is no evidence that the juror in fact called. Respondent also indicates that petitioner was not present during the change of venue hearing in March, 1981 at counsel's request in order to prevent the victim from viewing the petitioner for a long period of time in court. (Motion for Change of Venue Tr. at 6) Petitioner does not appear to challenge this, nor could he since counsel did this for strategic reasons. (PCHT 135-36)

Petitioner fails to show that he is entitled to relief. The exact scope of a defendant's right to be present at all proceedings connected with his criminal trial is not clear. Rule 43 of the Federal Rules of Criminal Procedure requires a defendant to be present at arraignment, time of plea and at every stage of the trial, including the impaneling of the jury and the return of the verdict and imposition of sentence, but not at a conference or

argument upon a question of law. It has been stated that this rule embodies rights at common law and not under the Constitution. 3A Wright, Federal Practice and Procedure § 721, p. 5 (1982). Thus, Rule 43 provides a broader scope of protection than that provided by the Constitution. United States v. Gregorio, 497 F.2d 1253, 1257-59 (4th Cir.), cert. denied, 419 U.S. 1024, 95 S.Ct. 501, 42 L.Ed.2d 298 (1974).

In United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), the Supreme Court discussed the two bases of constitutional protection concerning an accused's presence during criminal trial proceedings. It stated:

> The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., Illinois v. Allen, 397 U.S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In Snyder v. Massachusetts, 291 U.S. 97 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id., at 105-106, 108; see also Faretta v. California, 422 U.S. 806, 819 n.15 (1975). The Court also cautioned in Snyder that the exclusion of a defendant from a trial proceeding should be considered in light of the whole record. 291 U.S., at 115.

470 U.S. at 526.

The Supreme Court made clear that contact between the court and a juror in the absence of the defendant, as alleged by

petitioner in the instant case, does not violate a defendant's right to due process. The Supreme Court stated:

> We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the in camera discussion with the juror. "[T]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." Rushen v. Spain, 464 U.S. 114, 125-126 (1983) [Stevens, J., concurring in judgment].

470 U.S. at 526.

The remaining claims are petitioner's exclusion during motion argument and during the instruction and swearing in of the jury venire. In that regard, petitioner failed to make any objection as the Court found necessary in United States v. Gagnon, 470 U.S. at 528, 529. Even for a waiver of one's rights under Fed. R. Crim. P. 43, the defendant need not be explicitly advised of his right nor is any type of waiver on the record required. Rather, a total failure to assert one's rights is a sufficient waiver. Id.; see also Peretz v. U.S., ____ U.S. ____, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991).

In the instant case, petitioner has waived all of his claims pertaining to his absence by failing to make an objection on the record. In addition, he fails to show that his rights were violated. Petitioner makes a weak confrontation clause argument that he was not present during the testimony of the prosecutor. The prosecutor merely testified that under North Carolina law he

had discretion in charging individuals with first-degree murder and in seeking the death penalty. (JS 6-10) This type of hearing is even further removed from that of the competency hearing of two children which the Supreme Court found did not implicate a defendant's right to be present under the sixth amendment confrontation clause in Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). There, the questions at the competency hearing did not involve matters of guilt or innocence and in any event, could be repeated at trial. In the instant case, the questioning of the district attorney also did not implicate guilt or innocence, but rather a collateral matter not even connected with the evidence of the trial.

Petitioner fares no better under a due process analysis. Petitioner has to show that he was denied a fair or just hearing. His presence at a hearing is not guaranteed, especially when it would be useless or of doubtful benefit. 482 U.S. at 745. The motions and the swearing of the jury simply did not require petitioner's presence. He claims he lost the right to stare the jurors in the eye when they were put under oath. He alleges he was unable to defend himself because the court consolidated the charges in his absence. These assertions are feckless. U.S. v. Moore, 936 F.2d 1508, 1523 (7th Cir. 1991). His further argument that without an indication on the record of a knowing, intelligent and voluntary waiver, his absence constitutes per se constitutional error, has already been addressed and rejected. To the extent petitioner scores his counsel for failing to object to his absence, petitioner

likewise fails to show any cognizable prejudice. Therefore, petitioner's Claim XI should be dismissed.

Claim XII - Prosecutorial Misconduct

Petitioner claims he was denied his right to a fundamentally fair trial and sentencing hearing because of statements or arguments in the jury selection, during the trial and in the arguments to the jury. In order to succeed in these claims, petitioner faces a stiff burden. The issue is not whether the remarks were unfair, undesirable or universally condemned. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Rather, the issue is whether the prosecutor's actions or comments so infected the trial with unfairness that any resulting conviction necessarily denied due process. Id.

In making the review, the Court may look to see whether the prosecutor intentionally manipulated or misstated the evidence or in some way implicated another specific constitutional right. 477 U.S. at 182. The Court must look at the effect of the comments on the trial as a whole. When the weight of the evidence against petitioner is heavy, there is a reduced likelihood that the jury's decision could be influenced by the challenged actions. Id. The Court may also look to see whether defense counsel made tactical decisions or otherwise invited the prosecutor's actions. Id. The standard of review is a narrow one, directed solely to due process rights and a habeas corpus court may not engage in a broad exercise of its supervisory power. Id. at 181. The Court may also consider whether there was an objection or request to caution the jury.

United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988). With respect to actions, a prosecutor enjoys broad discretion. United States v. Gravely, 840 F.2d 1156 (4th Cir. 1988)(not misconduct to immunize some witnesses but not all).

Turning to the specific facts of the instant case, petitioner fails to show that he was denied a right to a fair trial by the prosecutor's remarks, actions or argument. First, petitioner argues that in the jury selection the prosecutor repeatedly attempted to denigrate the jurors' sense of responsibility. However, petitioner only cites one instance. The prosecutor, when questioning a juror, indicated that the juror was being asked to function under the law but, "[y]ou are not personally doing anything." (JS 67) This statement was made during the voir dire to Mrs. Klutz. Petitioner struck this juror. (JS 88) The other jurors were sequestered. This isolated remark as to a struck juror does not justify overturning petitioner's conviction.

Next, petitioner complains because the prosecutor asked jurors about their organizational and religious affiliations (JS 61) and whether they could recommend the death penalty without hesitation (JS 66). While the prosecutor did ask Mrs. Klutz about her affiliations and whether she could recommend the death penalty, she was stricken from the jury. The remainder of the allegation is conclusory. Petitioner states, "When unable to excuse these less gung-ho jurors for cause, they were peremptorily stricken." Without citation to the record, the claim may be dismissed on that

basis. O'Bremski v. Maass, 915 F.2d 418; Riley v. Lockhart, 726 F.2d 421. This claim is merely argumentative.

Petitioner asserts that in the guilt phase, the prosecution sought to manipulate the admission of irrelevant prejudicial testimony by encouraging witnesses to refer to petitioner as "Wild Man." (Tr. 507) Prior to that time, the witnesses had referred to petitioner as Wild Man because that was his nickname. With this particular witness, the prosecutor merely asked the witness if petitioner had any nicknames and the witness responded. The question was not irrelevant since it served to identify petitioner and tie him in with the testimony of the other witnesses who testified.

Petitioner alleges that the prosecutor failed to disclose promises made to Phyllis Soden in exchange for her testimony against petitioner. He bases the claim on the fact that Ms. Soden admitted to the commission of at least three uncharged criminal acts during her testimony and admitted that she had not been prosecuted for them. Petitioner fails to provide citation to the record with respect to those facts as ordered. Therefore, the allegations are conclusory. Riley v. Lockhart, 726 F.2d 421. More importantly, petitioner fails to show there were in fact promises. Petitioner may be referring to the testimony discussed in Claim VII-E about Ms. Soden's prostitution activity and petitioner's trying to make her an accessory after the fact. These are not the sort of matters where one would expect promises and petitioner fails to show any.

The remainder of petitioner's claims allege prosecutorial misconduct during arguments to the jury. The Court has already discussed and rejected these issues in the discussion of Claim VII.

Petitioner complains about the prosecutor calling the victim's house a "crucifixion block" and indicating it sickened him that a defendant was tried in a beautiful courtroom while victims are shot down to lay in their own blood and vomit. (Tr. 981) He alleges that the prosecutor urged conviction in order to do something about crime. (Tr. 989) The prosecutor also indicated that while petitioner was advised of his rights with respect to a search and seizure, that the Shinns also had a right to be free from assault (Tr. 1017) and that while defendant has two attorneys, the deceased victim did not have an attorney when he was at the mercy of petitioner (Tr. 1018). These last comments were made during the penalty phase of the trial. While the comment about the "attorney" tends to tangentially implicate petitioner's constitutional rights, neither it nor the other comments are sufficiently egregious so as to vitiate the trial as previously discussed. The evidence against petitioner was extremely strong, the remarks were isolated and did not ask the jury to make any specific adverse prejudicial inference against the petitioner. That is, the remarks were general in nature.

Next, petitioner claims that the prosecutor argued during the jury selection that the killing was heinous and this was not an aggravating circumstance under the statute. (JS 1013) The remark was not improper. It did not suggest an additional basis for which

the jury could sentence petitioner to death. Rather, the comment merely indicated that the actions by petitioner were particularly loathsome, as the evidence indicated.

Finally, petitioner alleges that the prosecutor reminded the jurors to remember their promise to sentence to death in an appropriate case and that this was improper. Petitioner fails to provide a citation for this allegation as ordered by the Court and, therefore, it may be dismissed as conclusory. It would appear that petitioner may be referring to the reference found at JS 1022. There, the prosecutor reminded the jurors that they all agreed that they believed in the death penalty and also that the jurors did not believe that the death penalty should be imposed in all cases, but when asked if murder in the first degree was one case when it should be imposed, they said yes. He then stated,

> I'm not going to back you in that corner. I will say this to you, under the circumstances of this case, . . . if that is not sufficient to put that man to death under the law, let's throw the death penalty out and say the State of North Carolina has no death penalty.

(Tr. at 1022) The remark, if initially improper was corrected by the prosecutor and in all events, cannot be said to be constitutionally improper.

XII(2)[6] - Petitioner Precluded from Presenting Mitigating Evidence

This claim was discussed in reference to petitioner's ineffective assistance of counsel claim. It is without merit.

[6]Petitioner erred in marking out his claims in the petition and used two Roman Numeral XII's.

Petitioner attempted to establish his good character through the state's witness, Mr. Tucker. The court sustained an objection. The trial court did not commit error in excluding such evidence at the guilt phase of the trial and sustaining the objection did not preclude petitioner from presenting mitigating evidence.

XIII - Jury Instruction Sheet Violated Petitioner's Eighth Amendment Right

Petitioner alleges that the instructions and jury instruction sheet prevented the jurors from "giving independent mitigating weight to aspects of defendant's character and record and to circumstances of the offense proffered in mitigation." He cites Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Petitioner argues that the trial court erred by instructing the jury that if it unanimously found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, then it would be their duty to recommend that petitioner be sentenced to death. (Tr. 783-84) Such language is not impermissibly mandatory. Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). To the extent petitioner argues otherwise, he is seeking to establish a new rule of law and is prohibited from doing so by Teague v. Lane, 489 U.S. 288. Petitioner has not contested a Teague dismissal in his response.

XIV - Exclusion of Jurors for Cause Based on their Beliefs About the Death Penalty

Petitioner alleges that jurors Elaine Auten, Barbara Littles and Glen Medlin were improperly stricken from his jury. He admits that the voir dire examination of these jurors was somewhat confused. Defense counsel objected to the court's discharging them for cause.

The Fourth Circuit has recently reviewed a similar type challenge in Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991). There, the court set out the standard of review employed by a federal habeas corpus court. It stated,

> [A] venireman can be excused if his views on the death penalty "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright, 469 U.S. at 424, 105 S.Ct. at 852. The Court has held that the question of juror bias is to be resolved by the trial judge's assessment of demeanor and credibility, and that such assessments are to be accorded a presumption of correctness under 28 U.S.C. § 2254(d). 469 U.S. at 426-29, 105 S.Ct. at 853-54. Moreover, it has been established in this court that where the prospective juror's response, as captured in the transcripts, reflects some ambiguity in the state of mind of the juror, then the determination made by the trial court, based on its eyeing the juror, is presumed to be consistent with the applicable standard. See Briley v. Bass, 750 F.2d 1238, 1246-47 (4th Cir. 1984)(where venireman's responses were part equivocal and part in opposition to death penalty, federal habeas court reasonably may rely on trial court's discretion to determine which response accurately reflects venireman's state of mind).

Id. at 415.

The Court will first examine Ms. Auten's testimony. (JS 197-207) The the entire colloquy between the prosecutor and Ms. Auten will not be set out. However, she emphatically stated that based on her feelings she just did not believe in capital punishment. (JS 201) The thought of it was offensive to her. (JS 202) There was a point where it appeared that she indicated that she might bring back a verdict of guilty even though she knew this would result in the defendant being put to death. (Tr. 202) On further clarification, she indicated she really did not know if she could vote that way and that the entire subject was making her nervous. (Tr. 202-03) Thereafter she stated she did not feel the courts or anyone else had a right to take human life and that she just would not take anyone's life. (Tr. 203) She then stated that she was opposed to the death penalty but she didn't know because if she heard the case she might change her mind, she just didn't know. (Tr. 204) She indicated that it was not likely that she could vote for the death sentence. She could not think of any circumstances in which she would vote for it. (Tr. 204) She finally ended up saying she could not vote for the death penalty. (Tr. 206)

Contrary to petitioner's claims, striking Ms. Auten for cause did not violate petitioner's constitutional rights. Here, her responses cannot be termed equivocal, but to the extent they were, the trial judge's determination may be presumed to be correct Id.

Next, petitioner challenges the striking of juror Barbara Littles. (JS 471-81) Ms. Littles' first response, to whether the death penalty would be proper, was yes. (JS 477-78) However, the

prosecutor then asked whether she could return to the courtroom and look at the defendant and say, "Mr. Lawson, I think you should die." (JS 478) After that, she stated no, she could not do that based on her religious beliefs. She was asked if there might be some circumstances which she could render a verdict of death. She indicated that there might be if she examined herself. (JS 478-79) The prosecutor asked for clarification and she indicated that she could not bring back a death verdict knowing the consequence and could not think of any circumstances where she could. (JS 479) She then stated she did not know whether she believed in the death penalty but she did know she could not return a verdict where a person would be sentenced to die. She also stated she would automatically vote against the death penalty if she were on the jury. (JS 479-80) She then repeated her position several times. (JS 480) When the prosecutor moved to excuse her for cause, the court conducted its own examination and found that Ms. Littles would not be able to vote for the death penalty and excused her.

In Ms. Littles' case, there was some initial indication that she could vote for the death penalty. However, after more probing inquiry, she definitely indicated she would not vote for the death penalty under any circumstances. The court independently examined her. To the extent there is any ambiguity, this Court may presume the trial judge's assessment of demeanor and credibility are correct. There was no error in striking Ms. Littles.

Last, petitioner complains about the striking of juror Medlin. (JS 589-97) He immediately stated that after giving the matter

considerable thought, he was not sure that he could be part of the process which caused someone to lose their life. (JS 593) He indicated he could not vote for the death penalty because of the inequality of the punishment. (JS 594) He did not waiver from this position. For reasons previously stated, there is no error in striking Mr. Medlin from the jury.

XV - Black Persons Unconstitutionally Excluded from the Jury

Petitioner claims that black persons were unconstitutionally and intentionally excluded from the jury. This claim involves the excusing of Barbara Littles from the jury because she could not vote for the death penalty. The basis for the claim is the following colloquy:

Mr. Roberts: [The prosecutor] Now, traditionally, and you know this as well as I know it, the black community is opposed to the death penalty because years ago it seemed like only the black people were the ones that were put to death. Now, you are aware of that, aren't you?

Ms. Littles: Yes, sir.

Mr. Roberts: And have you ever discussed that aspect of the death penalty with the people in your community?

Ms. Littles: No, sir.

(JS 478-477) This colloquy arose after Ms. Littles indicated that she did not know if she were personally opposed to the death penalty because she had not given it much thought. The state,

therefore, reminded her that the matter was important because it would be a waste of time to permit a juror to sit who could not under any circumstance render a verdict that the defendant be sentenced to death. (JS 476) After the colloquy quoted above, the prosecutor continued asking her questions. Ms. Littles' responses were equivocal, but eventually he said she could not vote for the death penalty and the trial judge independently corroborated this, as was discussed in Claim XIV.

Petitioner claims Ms. Littles was excused solely on account of her race in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The claim must be dismissed for several reasons.

Since petitioner is not black, he would apparently rely on Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race based exclusion of persons from a petit jury. The claim in this case is barred because petitioner would be seeking to apply a new rule of law in this case and is barred by Teague v. Lane, 489 U.S. 288. Petitioner has not contested this ground for dismissal in his response.

In addition, it is clear that Ms. Littles was stricken not because of her race, but because of her inability to vote for a death penalty. Significantly, in this case, the judge himself examined Ms. Littles before granting the motion to excuse her. It is clear from the record that the prosecutor was solely concerned

with Ms. Littles' statements about the death penalty. The claim is without merit.

Conclusion

In conclusion, it is found that all of petitioner's claims may be denied without an evidentiary hearing. The record before the Court establishes that petitioner is not entitled to relief and, therefore, the petition should be denied and dismissed.

IT IS THEREFORE ORDERED that petitioner's motions for discovery and the appointment of a psychiatric expert, Dr. Billy Royal, are denied.

IT IS RECOMMENDED that respondent's motions to dismiss the petition on the grounds that petitioner has added a new, unexhausted claim as to his mental competency claim and to amend his answer to raise the exhaustion defense, and his motion to partially dismiss the petition on the ground that petitioner has procedurally defaulted certain claims, be denied.

IT IS FURTHER RECOMMENDED that respondent's motion to dismiss the petition be granted, petitioner's motion for an evidentiary hearing be denied, and that the petition be dismissed.

Russell A. Eliason
United States Magistrate Judge

November 19, 1991

Supreme Court, U.S.
FILED
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ORIGINAL

No. 93-7657
No. A-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, Warden, Central Prison
Raleigh, North Carolina,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

I. DOES TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY NOT MAKING FURTHER INVESTIGATION OF POSSIBLE MENTAL HEALTH MITIGATION AFTER A COMPETENT AND SEEMINGLY RATIONAL CLIENT MAKES A KNOWING DECISION NOT TO PRESENT MITIGATION EVIDENCE AT HIS CAPITAL SENTENCING HEARING?

II. DO THE SENTENCING INSTRUCTIONS GIVEN IN THIS CASE VIOLATE THE DICTATES OF MILLS V. MARYLAND, 486 U.S. 367 (1988) OR MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990) WHERE, AS HERE, THERE IS NO MENTION OF UNANIMITY IN THE INSTRUCTIONS ON CONSIDERING MITIGATING EVIDENCE?

III. DID THE FOURTH CIRCUIT PROPERLY HOLD LAWSON UNENTITLED TO A FURTHER EVIDENTIARY HEARING ON THE VOLUNTARINESS OF HIS WAIVER OF HIS RIGHT TO PRESENT MITIGATING EVIDENCE DURING HIS SENTENCING HEARING, WHERE, AS HERE, THE RECORD WAS FULLY DEVELOPED IN STATE COURT?

IV. DID THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRM THE DISTRICT COURT'S RULING THAT LAWSON WAS UNENTITLED TO A FURTHER EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE, AS HERE, THE RECORD WAS FULLY DEVELOPED IN STATE COURT?

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No. 93-7657
No. A-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, Warden, Central Prison,
Raleigh, North Carolina,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION FOR STAY OF EXECUTION

The Respondent, Gary Dixon, Warden of Central Prison in Raleigh, North Carolina [hereinafter "State"], by undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina and Special Deputy Attorneys General Joan Herre Byers and Barry S. McNeill, opposes and requests that this Court deny the PETITION FOR WRIT OF CERTIORARI filed by Petitioner David Lawson [hereinafter "Lawson"] on January 24, 1994 requesting further review of the decision of the Fourth Circuit

Court of Appeals entered August 26, 1993 in Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993). The State also requests that this Court deny Lawson's MOTION FOR STAY OF EXECUTION so that Lawson's execution may be carried out as scheduled on Friday, February 18, 1994. Pursuant to North Carolina Law, N.C.Gen.Stat. §15-194 (1983), the granting of even a temporary stay requires that a new execution date be set no earlier than sixty to ninety days after any stay has been lifted or expires. Woodard v. Hutchins, 464 U.S. 377, 384 n.4 (1984) (Marshall J. dissenting).

For the reasons explained in this response, neither the MOTION FOR STAY, nor the PETITION FOR WRIT OF CERTIORARI upon which it is based, "reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1981). There does not exist a reasonable possibility that four members of the Court would consider the issues raised sufficiently meritorious for the grant of certiorari. Maggio v. Williams, 464 U.S. 46, 48 (1983). Rather, the issues raised reflect merely the application of specific facts to settled rules of law and fail to reveal any substantial conflict among the circuits concerning these rules of law.

CITATIONS TO OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2 these items are omitted since the State is satisfied with Lawson's statements of the CITATIONS TO OPINION BELOW, JURISDICTION, and CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

STATEMENT OF THE CASE

A. Procedural History

Lawson murdered Wayne Shinn and seriously injured Buren Shinn, Wayne's father, during a break-in at Wayne Shinn's home on December 4, 1980. Lawson was arrested on December 31, 1980. Lawson was appointed two counsel on December 31, 1980. On January 12, 1981, these counsel withdrew from representation. On January 12, 1981 James C. Johnson and Franklin R. Plummer were appointed to represent Lawson.

On March 19, 1981, a Cabarrus County Grand Jury indicted Lawson for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. Lawson was tried on pleas of not guilty at the May 26, 1981 session of Cabarrus County Superior Court and was found guilty as charged. On June 6, 1981, he received a sentence of death for the first-degree murder conviction.

The Supreme Court of North Carolina affirmed Lawson's convictions and death sentence on May 21, 1984. State v. Lawson,

314 S.E.2d 493 (N.C. 1984). Certiorari was denied on May 20, 1985. Lawson v. North Carolina, 471 U.S. 1120 (1985).

Lawson, through new counsel, filed a Motion for Appropriate Relief pursuant to N.C.Gen.Stat. §15A-1411 (1978) in the Superior Court of Cabarrus County on February 11, 1986, which was amended on May 6, 1986 and May 21, 1987. This Motion raised claims of ineffective assistance of counsel at trial and on direct appeal. Specifically, Lawson claimed that Mr. Johnson, his trial and appellate counsel, had rendered ineffective assistance of counsel with respect to (1) his motion to change venue; (2) jury selection; (3) the identification procedures employed at trial; (4) his failure adequately to challenge on direct appeal the sufficiency of the evidence to support aggravating factors at the sentencing phase; (5) his failure adequately to challenge the sufficiency of the evidence to support the jury's imposition of the death sentence; (6) his failure adequately to challenge the proportionality of the death sentence; (7) failure to present mitigating evidence during the penalty phase of the trial; (8) deficiencies in the preparation and filing of a petition for writ of certiorari in the Supreme Court of the United States; (9) deficiencies in the preparation of the record on appeal and the written brief in the Supreme Court of North Carolina (10) failure to challenge the excusal of certain jurors; and (11) failing to have closing arguments transcribed and presented to the Supreme Court on appeal. Lawson's motion, as amended, also challenged

the impartiality of the jury impaneled to try his case, the sufficiency of the evidence supporting the aggravating circumstances found by the jury and the State's excusal for cause of jurors with scruples against capital punishment, the alleged absence of a reliable sentencing determination because of the absence of mitigating evidence, and the unconstitutionality of a jury instruction imposing on the jury a duty to pronounce the death sentence if aggravating circumstances outweighed mitigating circumstances.

On May 26, 1987, an evidentiary hearing was held in the Superior Court of Cabarrus County before Superior Court Judge Thomas W. Seay, Jr. on Lawson's post-conviction claims, including ineffective assistance of counsel for failing to develop mitigation evidence and to ensure a reliable sentencing hearing. At the Hearing, Lawson's counsel represented that there were no other contentions to be included in Lawson's Motion for Appropriate Relief. The Superior Court denied relief in an order entered July 1, 1987.

On February 3, 1988, the Supreme Court of North Carolina denied Lawson's petition for writ of certiorari seeking review of Judge Seay's decision, State v. Lawson, 364 S.E.2d 662 (N.C. 1988), and on April 6, 1988 also denied Lawson's amended petition for writ certiorari, State v. Lawson, 367 S.E.2d 919 (N.C. 1988).

On February 17, 1988, Lawson's execution was rescheduled for April 22, 1988. On March 31, 1988, Lawson filed a Petition for

Writ of Certiorari and Motion for Stay of Execution in the United States Supreme Court, seeking review of the post-conviction judgment by Judge Seay.

On April 14, 1988, Lawson filed in the United States District Court for the Middle District of North Carolina a motion for stay of his execution pending disposition of his certiorari petition in the United States Supreme Court, in order to afford him time to file a Petition for Writ of Habeas Corpus. On April 19, 1988, United States District Judge Hiram H. Ward granted Lawson's motion, and directed that Lawson's habeas petition be filed within 60 days.

On April 20, 1988, the United States Supreme Court denied Lawson's petition for writ of certiorari and motion for stay. Lawson v. North Carolina, 485 U.S. 1016 (1988).

On July 18, 1988, Lawson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Middle District of North Carolina. Lawson acknowledged that many of his claims raised in his habeas petition were new and had not been presented to the Superior Court of Cabarrus County in his previous Motion for Appropriate Relief. In recognition that the presentation of such a "mixed" petition would compel dismissal for non-exhaustion of state court remedies under Rose v. Lundy, 455 U.S. 509 (1982), on July 19, 1988 Lawson contemporaneously filed a second Motion for Appropriate Relief in the Superior Court of Cabarrus County,

raising the previously unexhausted claims he had presented for the first time in his habeas petition. On September 23, 1988, Lawson filed in Cabarrus County Superior Court a Notice withdrawing his second Motion for Appropriate Relief, noting that the same claims therein also were pending in his federal habeas proceeding; that the State had waived exhaustion and consented to federal adjudication of these claims.

On November 1, 1988, the State filed its answer to Lawson's habeas petition, explicitly waiving the exhaustion defense to the unexhausted claims. Lawson filed a traverse to the answer on February 3, 1989, and subsequently filed an ex parte motion for the appointment of a psychiatric expert to assist in the development and presentation of his mental health habeas claims, or in the alternative for an ex parte evidentiary hearing to show that expert psychiatric services were reasonably necessary to the full and fair adjudication of these claims. In support, Lawson proffered the affidavit of Dr. Billy Royal, the psychiatrist he asked the court to appoint, which stated that Dr. Royal already had formed his opinion on Lawson's alleged lack of competency and inability to waive his right to a sentencing hearing and desired further evaluation of Lawson in order to study possible mitigation.

On April 6, 1989, the Magistrate-Judge held a hearing at which Lawson was required to reveal to the State the basis for his motion to appoint a psychiatric expert. After the hearing,

the Magistrate-Judge required Lawson to Brief and identify those habeas claims for which he had requested an evidentiary hearing on the appointment motion. On May 12, 1989, the State replied with a motion to dismiss the habeas petition in its entirety, contending that the appointment motion so altered Lawson's habeas petition that it, in essence, raised a new, unexhausted claim, which should be dismissed pursuant to Rose v. Lundy.

On March 16, 1990, Lawson filed in the Supreme Court of North Carolina a motion to remand for the imposition of a life sentence based upon the intervening decision in McKoy v. North Carolina, 494 U.S. 433 (1990). On March 21, 1990, Lawson also filed in federal district court a motion to defer further proceedings on his habeas petition pending re-exhaustion of his McKoy claim. On May 18, 1990, Magistrate Eliason ordered that Lawson's habeas petition be held in abeyance until the Supreme Court of North Carolina had ruled on McKoy and Lawson's motion to remand. On October 5, 1990, the Supreme Court of North Carolina dismissed Lawson's motion to remand, State v. Lawson, 397 S.E.2d 231 (N.C. 1990) and the federal district court subsequently activated Lawson's habeas action.

On August 16, 1991, the Magistrate-Judge permitted the State to amend its answer to raise the defense of non-retroactivity pursuant to Teague v. Lane, 489 U.S. 288 (1989).

Following further briefing by both parties, on November 19, 1991, the Magistrate-Judge filed his recommendations that

Lawson's habeas petition be dismissed and that Lawson's motions for discovery, appointment of a psychiatric expert, and an evidentiary hearing be denied. Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Nov. 19, 1991) (ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE). On December 17, 1991, Lawson filed objections to the Magistrate's findings and recommendations. On January 7, 1992, United States District Judge Frank W. Bullock, Jr. adopted the magistrate's recommendations, and entered a Judgment dismissing the petition. Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Jan. 7, 1992) (JUDGMENT and ORDER of United States District Judge Frank W. Bullock, Jr.).

On January 22, 1992, Lawson moved to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e), and alternatively for relief from the judgment pursuant to Fed.R.Civ.P. 60(b). The State filed a response in opposition on February 7, 1992. On February 26, 1992, Judge Bullock denied Lawson's motions.

On March 18, 1992, Lawson filed a second motion for relief from the judgment pursuant to Fed.R.Civ.P. 60(b) based on Williams v. Dixon, 961 F.2d 448, 451-59 (4th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 510 (1992). The State filed a response in opposition on March 27, 1992. Meanwhile, on March 20, 1992, Lawson filed an application to extend the stay of his execution, and for a certificate of probable cause to appeal. Lawson filed a notice of appeal on March 27, 1992. The State filed a response in opposition to Lawson's application for an extension of the

stay and certificate of probable cause, and on March 31, 1992, Judge Bullock denied Lawson's motions, finding he had failed to make a substantial showing of the denial of a federal right. On April 7, 1992, Lawson filed a renewed notice of appeal as to both the dismissal of his habeas petition and the denial of his Rule 60(b) motion.

On April 8, 1992, and faced with a pending hearing to reschedule his execution date pursuant to N.C.Gen.Stat. §15-194 (1983), Lawson filed an Application for Stay of Execution and Certificate of Probable Cause and Supporting Memorandum in the United States Court of Appeals for the Fourth Circuit. The State filed a response in opposition on April 11, 1992, and on April 17, 1992 the Fourth Circuit entered an Order staying the setting of Lawson's execution by the State of North Carolina "during the pendency of this appeal or until further order of this Court." The Fourth Circuit granted a certificate of probable cause for Lawson's appeal.

On August 26, 1993, the Fourth Circuit panel issued a unanimous decision affirming the District Court's denial of federal habeas relief. Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993). On October 26, 1993, the Fourth Circuit also denied Lawson's petition for rehearing and suggestion for rehearing in banc.

B. Statement of Facts

1. Trial Evidence

The trial evidence, as summarized by the Supreme Court of North Carolina in State v. Lawson, 314 S.E.2d at 495- 97, is as follows:

> In December 1980, Buren Shinn resided in a house on Old Salisbury Road, approximately three miles from Concord. Buren's son, Wayne Shinn, lived in a house located about 100 yards away. Buren and Wayne worked together in a family electrical business.
>
> After driving to his father's home on 4 December 1980, Wayne heard the burglar alarm at his own home. Wayne and Buren jumped into a truck and rushed over to Wayne's house, where they observed a dirty brown Ford parked in the driveway. Wayne got out of the truck and ran towards the patio at the side of his house. Buren then saw Wayne throw up his hands and heard a gun fire.
>
> Buren ran to the truck, got in and began backing the truck in an effort to get away. Lawson ran toward him, waving a pistol. This sight diverted Buren's attention and he backed the truck into a ditch. Lawson approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with Lawson not to hurt him.
>
> Before Buren reached the house, he heard another gunshot and felt a sharp blow to his head. He fell to the ground and lost consciousness. Sometime later he "came to," finding himself lying in a large pool of blood. Fearing that Lawson might still be in the vicinity, he lay silently. Some twenty or thirty minutes later, he heard someone walk toward him and he felt a hand reach into his pocket and take his wallet.
>
> Buren remained motionless for another twenty minutes. Hearing no more footsteps, he partly raised himself up. Seeing no one, he crawled away

from the patio toward the road, hoping to stop a passing car. When no one stopped, he struggled to his feet and walked toward his home. As he entered his home, another son, Jerry, saw him and telephoned for help. After Jerry was told what had happened, he left to see about Wayne.

Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound in the back of his head. Buren's injuries were not life threatening since the bullet which struck him did not penetrate his skull. He recovered after a short stay in the hospital.

The police found Wayne's house ransacked. They found several jewelry items and a camera in a pillowcase, apparently dropped by the intruder. Marks on the kitchen door indicated the house had been forcibly entered.

Phyllis Soden, who had known Lawson for several years, returned to her home from work at about 4:00 a.m. on 4 December 1980. Shortly after 9:00 a.m. Lawson went to her home and stated that he needed her to take him some place immediately. Leaving his dirty brown Ford in her driveway, the two departed in her automobile. Lawson directed her to drive on the Old Salisbury Road. As they neared the Shinn home he told her to stop, let him out, drive a short distance farther, turn around and return to pick him up. She followed Lawson's directions. When she returned, he ran to the car carrying a crowbar.

After they returned to Ms. Soden's home, Lawson explained that he had broken into a house and had left the crowbar there. He wanted to retrieve the bar because it might have his fingerprints on it. A little while later, Lawson showed her a wallet and removed the money from it. Thereafter, he told her: He had broken into a house after hearing that the residents had gold and jewelry. He found some items and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. He pointed his gun at the man who put up his hands. He ordered the man to turn around and shot him in the back of his

head. After the man fell, he ran out of the house. When he left the house, he saw another man approaching the patio. The other man turned, ran and entered a truck. He ordered the man out of the truck; and although the man begged Lawson not to shoot, Lawson forced him to walk toward the patio and shot him in the back of his head. He was confident both of the other men were dead because he shot them at close range. He killed them to eliminate witnesses because he did not want to go back to prison.

Lawson offered no evidence at the guilt-determination phase of the trial.

The jury convicted Lawson of assault with a deadly weapon with intent to kill inflicting serious injury upon Buren Shinn and felonious breaking of the home of Wayne Shinn. It also convicted him of the first-degree murder of Wayne Shinn.

The following transpired at the sentencing phase of the murder case. Outside the presence of the jury Lawson was examined under oath by one of his lawyers. During this examination Lawson testified that his counsel had fully advised him regarding the nature of the sentencing phase of the proceeding. Lawson also acknowledged that on that day, June 6, 1981 he signed an affidavit in which he acknowledged that he told his attorney, Mr. Johnson, on at least five separate occasions . . . that should I be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The trial judge then advised Lawson that notwithstanding his desire to be sentenced to death, the jury must make that decision and that the court by law was required to submit whatever

aggravating and mitigating circumstances were supported by the evidence. The trial judge said, "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may . . . still see fit to recommend life imprisonment." The Court also determined from questioning that Lawson understood what the Court had said and that the paper writing, in fact, accurately expressed what he desired done.

The jury was then brought back into the courtroom. Lawson testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the State "involving some criminal matters in Stanly County some years ago." The following colloquy then occurred:

> Q. At this time would you tell the jury what your request is regarding their decision?
>
> A. I'd like the death penalty.
>
> Q. Would you care to tell us why you want the death penalty?
>
> A. To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life that's not right. You think I done it, gas me.
>
> Q. And you're - you know what you're asking?
>
> A. Yes, sir.
>
> Q. You know it's my responsibility to try to save your life?
>
> A. Yes, sir.
>
> Q. That's all.

There was a brief cross-examination by the State during which Lawson admitted that he owned a .32 caliber pistol in September 1980; he had

> attempted to purchase a pistol shortly after 4 December 1980; and on 4 December 1980 he had gone to Salisbury with Phyllis Soden. At the guilt phase of his trial a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 caliber bullet.

The jury, after finding in aggravation of the murder that the murder was for the purpose of avoiding arrest and that the murder was part of a course of conduct in which Lawson engaged which included the commission of other crimes of violence, and finding that mitigation was present, determined based on further findings that Lawson should be sentenced to death for the murder of Wayne Shinn.

2. Motion for Appropriate Relief

James C. Johnson, Jr., one of Lawson's trial lawyers and his appellate counsel, testified that he has practiced law since 1962 when he graduated in the top ten of his class from Wake Forest Law School. He clerked for two federal judges and then went into private practice. Over the years he has had an extensive criminal practice and has tried eight to ten first-degree murder cases. Prior to the trial of the Lawson case, Johnson tried State v. Roger Warren Clark, 270 S.E.2d 425 (N.C. 1980). In that case Johnson made a successful change of venue motion and presented mitigating evidence. As a state senator representing Cabarrus County, Johnson helped author much of the present North Carolina death penalty statute.

Johnson testified that he and Frank Plummer were appointed in January 1981 to represent Lawson. He did not know the Shinns personally but knew they were a respected family in the Mt. Gilead Community. Johnson filed a motion requesting a change of venue due to pretrial publicity, nature of the crime, reputation of the deceased's family, and sentiment and resentment in the community over the crime. He presented news clippings and several reporters at the hearing. He elicited from the reporters the word-of-mouth publicity and local prominence of the Shinn family. In preparation for this hearing he talked to people at the various eating establishments where the "courthouse crowd" gathered and could find no one who would testify they felt that Lawson could not receive a fair trial. He also checked at the junk yards and bars and did not find the strength of opinion he expected. After the motion for change of venue was denied, Johnson got the jury list and the responses the potential jurors gave to the questionnaire sent out by the Court. He drove around the county and looked at the addresses. He or his co-counsel went over the jury lists with Lawson to determine which jurors appeared favorable.

As a matter of strategy he waited until trial to object to Mr. Shinn's identification of Lawson so that Shinn would not have his identification reinforced by seeing Lawson again. At trial Johnson felt Mr. Shinn would be under maximum pressure. As part of this strategy, Lawson agreed to waive his presence at the

pretrial change of venue hearing so Mr. Shinn would not see him then.

Johnson and Plummer also did much investigation of Lawson's possible mitigation. They found little mitigation of worth. Mr. Johnson and Mr. Plummer, not predicessor counsel, as Lawson mistakenly asserts, moved for a competency hearing as soon as they got into the case. The unopposed motion was granted. The Court's order was prepared on firm paper. At the time the Motion was made Lawson asked Johnson if he thought he was crazy. Johnson stated, no that he wanted to make certain Lawson got some help if there were any serious mental problem. Johnson and Lawson then went over what Lawson should expect during the examination and for Lawson to be careful about discussing the facts of the case with the Dorothea Dix personnel. When Lawson was sent to Dorothea Dix, he was found competent to stand trial and there was nothing of mitigating value in that evaluation, in counsels' opinion. Lawson appeared to Mr. Johnson to be intelligent, manipulative, and fully in control. When the competency evaluation came back, Johnson reviewed it with Lawson and Lawson pointed out to Johnson that he had not done anything at Dorothea Dix to reveal any facts in the case. In conversations with Johnson, Lawson never indicated that he thought he had any type of mental or emotional problem. Lawson told Johnson he did not use drugs. In working with Lawson, Mr. Johnson formed the opinion Lawson was well read and highly

intelligent. Johnson never had any problem working with Lawson. Johnson, who had minored in psychology in college, found Lawson's thought processes and his practice of reason and logic to the best of any client he had ever represented.

Lawson told Johnson not to contact his family since he had not been close to them for the last five to seven years. Johnson considered contacting them anyway, but decided the lack of contact with Lawson would render them ineffective witnesses. After Lawson stated he would rather get the death sentence than life imprisonment if he was convicted, Johnson did not request a further mental evaluation of Lawson since he felt Lawson's decision was a careful, thought-out, philosophical explanation. It was not a suddenly arrived at decision.

After initially denying complicity in the case, Lawson admitted to Johnson that he had murdered Wayne Shinn and wounded Buren Shinn. He told of his total lack of remorse over the incident other than that both men did not die. He explained he shot them so they could not identify him. With Lawson's knowledge, Johnson taped several of his conversations with Lawson concerning the crime, his desire to get the death penalty if found guilty, and his background. Prior to trial, Johnson obtained complete discovery from the State. Lawson never suggested he murdered Wayne Shinn because he was drugged or upset. He clearly stated he killed Wayne to avoid being identified because he did not wish to go back to prison.

During the trial, the strategy decisions were made by Johnson. However, he would ask Lawson if he felt anything further should be asked prior to relinquishing a witness on cross-examination. He made certain Lawson was well-dressed and coached him on trial behavior. Johnson attempted to elicit mitigation evidence during cross-examination.

The fact that Lawson repeatedly stated he desired the death penalty if found guilty did not stop Johnson from investigating possible mitigation. Through Lawson's sentencing testimony, Johnson attempted to introduce mitigation evidence about his lack of significant prior criminal activity, his lack of contact with his family, and other issues, but Johnson felt Lawson undercut him by asking the jury to return a sentence recommendation of death if the jury though he had committed the murder. Johnson argued for life despite Lawson's request for death.

Tim Hawkins, a Cabarrus County lawyer, testified that he withdrew from representing Lawson because his secretary was a friend of the Shinn family. He spoke to Lawson and Lawson agreed that it would be better if he did not represent Lawson. Hawkins was not asked about and did not testify to any concern about Lawson's competency during the time he briefly represented him. Hawkins stated that James Johnson and Frank Plummer enjoyed excellent reputations as attorneys.

3. Writ of Habeas Corpus

Lawson proffered an affidavit dated January 27, 1989 from Billy Royal, a physician formerly with Dorothea Dix Hospital who is now privately practicing as a "forensic" psychiatrist. Dr. Royal found fault with the competency evaluation given Lawson since the Dorothea Dix staff, in accordance with Lawson's request, did not contact Lawson's family in Michigan. Dr. Royal then opined based on his examination of the Dorothea Dix material as well as several interviews with Lawson that Lawson was incompetent at the time of sentencing and that Lawson was unable, due to Lawson's mental state to waive in a knowing and voluntary manner his right to a sentencing hearing. He also opined that due to drug use, and Lawson's alleged long-term mental disorders, two of the statutory mitigating circumstances, "mental and emotional disturbance" N.C.Gen.Stat. §15A-2000(f)(2) and "capacity to appreciate the criminality of conduct was impaired", N.C.Gen.Stat. §15A-2000(f)(6) likely were present from the evidence.

Lawson also proffered an affidavit from his mother detailing Lawson's childhood. She stated he was generally a happy child, but that after she remarried, his step-father was not accepting of him and favored David's half brother. She told of his going to reform school as a teenager due to his being caught stealing something. She did not detail any incident of prior psychiatric intervention when Lawson was a child or a young man.

The Magistrate-Judge ordered the record expanded to include the records on Lawson's competency evaluation at Dorothea Dix Mental Hospital.

The report of the psychiatrist, Dr. Groce, which had been sent to the lawyers prior to trial, found Lawson to have an adjustment disorder with depressed mood but found that Lawson was fully competent to proceed to trial.

His mental status upon admission showed him to be "alert and cooperative. His stream of mental activity was normal. He denied hallucinations and delusions. He reported previous suicidal thoughts and one attempt but denied suicidal intent at the time of admission. His memory, judgment and intellect all appeared within average limits." (Respondent's Appendix C, 1)

The psychological tests showed Lawson scored a 107 on the IQ test and his reading test was at ninth grade level or above. Mr. Lawson's Bender Gestalt figures did not suggest serious organicity. His projective drawings suggested significant psychopathology including a low self-esteem with feelings inferiority, insecurity and inadequacy. Mr. Lawson's MMPI profile suggested anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by a tendency to be self-dramatic. The psychiatrist noted based on the test results such persons may be expected to be chronically hostile and resentful and to sue projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient.

Expression of hostility and depression often form a cyclic pattern. Such patients are typically self-centered and dependent with an exaggerated need for affection.

The Hospital course revealed Lawson presented no management problem, that he was cooperative, and required no medication. He was given no medications upon discharge. (Respondent's Appendix C, 1-2)

The Magistrate-Judge by Order dated September 24, 1991 requested the parties to supplement the record with any additional material they desired on the issue of Lawson's competency. Thereafter, on November 19, 1991 the Magistrate Judge entered a recommendation that the writ of habeas corpus filed in this matter be denied. The United States District Court, on January 7, 1992, accepted these findings and ordered the petition dismissed.

REASONS WHY THE WRIT OUGHT NOT ISSUE

I. **TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR INVESTIGATION OF POSSIBLE MENTAL HEALTH MITIGATION WHERE, AS HERE, A COMPETENT AND SEEMINGLY RATIONAL CLIENT DEMANDS NO MITIGATING EVIDENCE BE PRESENTED AT HIS SENTENCING HEARING.**

Lawson, trying to create a certiorari worthy issue in this case where there is none, asserts that the Fourth Circuit, in alleged conflict with holdings from other circuits, has held that counsel need not investigate possible mitigating evidence in the

area of mental instability once a competent yet seriously impaired client instructs counsel he desires the death penalty. The Fourth Circuit, in affirming the unpublished opinion of the United States District Court for the Middle District of North Carolina, has not so held. Rather, the District Court, in conformity with decisions from the other circuits in the area of ineffective assistance of counsel, correctly found on this record, that counsel was not required to make a further investigation of possible mental health mitigation or the clients competency when this seemingly unimpaired defendant knowingly decided to present no mitigation evidence and demand the death sentence if he was found guilty. The Court quoted from the holdings of cases from other circuits in making this holding. Autry v. McKaskle, 727 F.2d 358, 362 (5th Cir.), cert. denied, 465 U.S. 1085 (1984) (If a defendant knowingly makes the choice not to present evidence in mitigation and request death, counsel was ethically bound to follow the client's wishes); Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986)

Lawson seeks to re-cast the District Court's decision as one in which the Court has permitted a finding of effective counsel where there was no investigation of the mental health of an obviously severely impaired client simply because he announced he desired the death penalty. The facts before the District Court in this case do not support this scenario.

It is undisputed that counsel ought not "blindly follow" the directives of an obviously impaired client. Rather, counsel has a duty to make a sufficient investigation of potential avenues of defense so that counsel may advise the client so that any subsequent decision by the client is a knowing one. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). Counsel should follow up those avenues of potential mitigation a client has not directly foreclosed. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) and counsel has expanded duties in the investigation of a case where counsel knows that a client is seriously impaired and cannot exercise proper judgment. Thompson v. Wainwright, 787 F.2d at 1451. However, when a rational client forecloses an area of investigation, he cannot later claim his lawyer was ineffective for following his express directive. Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026 (1987).

Counsel here did not "blindly follow" the directives of a person they thought to be impaired. Rather, the well developed record from the state court[1], as supplemented by the Dorothea Dix

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[1] Lawson asserts that there has been no evidentiary hearing on his claim that he was rendered ineffective assistance of counsel

Footnote continued on next page.

report in federal court, shows that counsel made an adequate mental health investigation prior to Lawson determining he desired not to present mitigating evidence. The record does not support a finding that counsel had reason to believe their client was irrational or seriously impaired or that either of the statutory mitigating factors set out in the statute was available in this case.

In arguing that Lawson's counsel knew Lawson was impaired and should have investigated his mental status for presentation of possible mitigating evidence, Lawson directed this Court's attention to the Motion and subsequent Order for a Competency Hearing filed in this case in late January, 1981. He also draws attention to an affidavit first presented in federal court by a Dr. Billy Royal dated January 27, 1989, some eight and one half years after the trial of this case in which Dr. Royal opined, based on several interviews with Lawson, a review of his Dorothea Dix Competency Evaluation, several witness interviews and his own

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Footnote continued from previous page.

by their not investigating or presenting evidence of Lawson's alleged mental difficulties to the sentencing jury. While it is true this exact claim was first raised in federal court, Lawson had raised two related claims in state court which required the development of most of the evidence necessary to decide this claim. Lawson in state court raised a claim of ineffective assistance of counsel for failing to present mitigating evidence and a claim that the presentation of no evidence in mitigation deprived Lawson of a reliable sentencing hearing. Thus, the bulk of the factual underpinnings for the present matter were of necessity litigated in state court.

belief that to request death is bizarre, that Lawson was seriously impaired, indeed incompetent, at the time of his trial and that Lawson's drug use and mental condition in 1980-81 could provide the basis for finding the presence of the two statutory mitigating factors dealing with impairment and that the murder was committed while the defendant was under a mental or emotional disturbance. See N.C.Gen.Stat. §15A-2000(f)(2) and (f)(6) (1988). Lawson also points to his demand that he receive the death penalty and his requesting his counsel not to speak to his parents and relatives as proof that he was impaired and that counsel should have known to investigate his mental status. Finally, he points to selected portions of the Dorothea Dix records as proof of impairment of which counsel should have been aware. This evidence, when read with the uncontradicted evidence from the state court, the state court records, and the taped conversation between Lawson and his lawyer, fails to make such a showing and casts no doubt on the appropriateness of the lawyer's actions in not requesting further mental health assistance in 1981 after Lawson decided that if he was found guilty he desired not to present mitigating evidence at his sentencing hearing and would request the death penalty.

The uncontradicted evidence from the State Motion for Appropriate Relief hearing revealed that Mr. Johnson[2] moved for a competency hearing for Lawson immediately upon getting into the case. The Motion for this review was co-signed by Lawson himself. (Respondent's Appendix A, 1) In this pre-Ake[3] era this use of a competency evaluation was often used by lawyers to determine if any significant mental mitigation might be available. See Smith v. Dixon, 766 F.Supp. 1370, 1393-94 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993), rev'd on another issue, ___ F.2d ___ (4th Cir., Jan. 21, 1994)(en banc). The Order subsequently signed by a District Court judge shows on its face that it was prepared by the law firm and merely recites the language of N.C.Gen.Stat. 15A-1002 (1988) necessary to get such an evaluation. (Respondent's Appendix A, 2-3) The allegations in the Motion and the findings in the Order are further set in perspective when reviewed in light of counsel's testimony concerning this matter. At the time of the evaluation, according to Mr. Johnson, Lawson asked Johnson if he thought he were crazy. Johnson testified that he stated no, that he wanted to make certain that Lawson got help if there was any mental problem. They went over what Lawson should expect while at

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2 Lawson mistakenly recites that prior counsel had made the request for the competency hearing. The State records show otherwise. (Respondent's Appendix A, 1-3)

3 Ake v. Oklahoma, 470 U.S. 68 (1985)

Dorothea Dix Hospital for the evaluation and that Lawson needed to be careful talking about the facts of the crime itself. When the competency report came back, Johnson went over the report with Lawson. (Respondent's Appendix D, 13-14)

Lawson, in speaking to Johnson about his background in the months prior to his trial and sentencing hearing, never indicated that he thought he had any type of mental or emotional problem or, apparently, had ever been treated for one. Lawson also told Johnson he did not use drugs and had not used them to excess in the past. Mr. Johnson formed an opinion over the months that he worked with Lawson that Lawson was well read and highly intellectual. He never had any problem working with Lawson. In fact, Mr. Johnson found that in terms of Lawson's mental processes and his practice of reason and logic, that Lawson was one of the best clients he had ever represented. (Respondent's Appendix D, 7-15)

Lawson told Mr. Johnson that he committed the crimes with which he was charged. He told him that he committed breaking and enterings to supplement his income as a logger, that break-ins were part of his profession. He did not tell him the murder and attempted murder occurred under stress. Rather, he explained that he killed Wayne Shinn and tried to murder Buren Shinn in order to eliminate witnesses so he would not have to go to prison when he was observed by the Shinns during his break in at the younger Shinn's home. He described in chilling detail his

thought process in determining to kill the two men, both of whom he shot in the back of the head even after they begged for their lives. He had no remorse over killing them, only that one of them lived to identify him. (Respondent's Appendix D, 19-26, 52-57)

Lawson also told Mr. Johnson that he was not in close contact with his relatives, including his mother, who lived in Michigan and had not been close or in contact with them for a number of years. Based on this lack of contact, Lawson did not desire his family involved in this case. Johnson considered contacting the family anyway, but determined any mitigating value would be off-set by a showing that they had not been in contact for years. (Respondent's Appendix D, 4-6, 31-32)

Johnson made his own investigation among people in Cabarrus County and Stanly County who knew Lawson. He spoke to the Stanly County deputies where Lawson had been caught and imprisoned for a series of house breakings. The information that Johnson received from people in Lawson's circle of acquaintances was that Lawson was a loner, somewhat of a braggart, and was known as a robber and thief and someone who would handle "hot" goods. Lawson's girlfriend was somewhat unstable and had already lied in the news paper in order to try to provide Lawson an alibi. Mr. Johnson considered her an inappropriate witness due to the danger of cross-examination. (Respondent's Appendix D, 8-10, 25-26)

The competency report that Johnson received from Dorothea Dix Hospital showed the forensic psychiatrist, Dr. Groce, determined that Lawson was competent and suffered from "an adjustment disorder with depressed features." The report noted that on admission Lawson was cooperative and alert. He required no medication and was given no medication upon leaving the hospital. His stream of mental activity was normal. He denied hallucinations or delusions when he spoke to the psychiatrist. He reported previous suicidal thoughts and one attempt when a girlfriend broke up with him. He denied any present suicidal thoughts. His memory, judgment, and intellect all appeared within average limits. The psychological testing showed an I.Q. of 107 and a reading ability of ninth grade or over. His Bender-Gestalt testing did not suggest serious organicity, so there was no basis to believe he had any organic brain dysfunction. His projective drawings

> suggest significant psychopathology including a low self-esteem with feeling of inferiority, insecurity, and inadequacy. Mr. Lawson's MMPI profile suggest anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by being self-dramatic. He may be expected to be chronically hostile and resentful and to use projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient. Expression of hostility and depression often form a cyclic pattern. Such patients are typically self-centered and dependent with an exaggerated need for affection.

(Respondent's Appendix C, 1-2)

This report does not give rise to a belief that Lawson is irrational. It reports no psychosis or serious impairment. It does not suggest the presence of mental health mitigation in a witness elimination murder. Thus, the evidence before the lawyers at the time that Lawson determined he desired the death penalty and not to present mitigation, failed to suggest either that Lawson had serious mental problems as opposed merely to an unsuccessful personality or that further examination of Lawson's mental status would be beneficial. Lawson and his attorneys obviously talked about the mental health mitigating circumstances set out in North Carolina's capital punishment statute. In the taped conversation between Lawson and one of his lawyers, they talk about the presentation of evidence that "you were emotionally upset or mentally wrong, whatever. We don't have any of those circumstances in this particular case." (Respondent's Appendix D, 35)

Thus, the record shows counsel already had investigated the possibility of helpful mental health material through the use of a competency hearing. This evaluation showed a rational, oriented, and intelligent man who was not adjusting well to incarceration and was depressed but who needed no medication for any of his problems. Counsel went over the competency report with Lawson so he was aware of what could have been presented about his personality deficiencies when he decided not to present mitigating evidence. Certainly his explanation of how the crimes

occurred foreclosed any further investigation into the issue of mental impairment or emotional distress during the crime. Under these circumstances, Lawson's tactical decision was a knowing one. His counsel were not ineffective for failing to demand a further competency evaluation for Lawson prior to acceding to his demand or doing yet further investigation into the area of his mental health since what they knew suggested little likelihood of finding any significant mitigating evidence. King v. Lynaugh, 868 F.2d 1400, 1403-05 (5th Cir.), cert. denied, 489 U.S. 1099 (1989); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988); Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1988) (Counsel may have been incompetent in failing to obtain a further psychological evaluation for Felde where their defense at the trial was insanity, suggesting they had a reasonable basis to believe the decision to ask for the death penalty was not the act of a rational person). The decision by Lawson to request death was not "mere jailhouse bravado" or the sudden whim of a desperately despondent person of the type condemned in Martin v. Maggio, 711 F.2d at 1280 and Blanco v. Singletary, 943 F.2d at 1502. Rather, this tactical determination was made over a period of months. As Mr. Johnson testified and as the taped conversation reveals, it is the carefully thought out decision of an intelligent and rational man who did not wish to live in prison, a man who preferred "quality" to "quantity" in life. (Respondent's Appendix D, 38-40, 46-49) The decision to take

this step was made after reviewing possible mitigation options and after he had foreclosed the need for further investigation of his mental health or the statutory mitigating circumstances dealing with impairment or emotional disturbance by explaining how deliberate the murder and murder attempt was and that he was not using drugs at the time. The competency evaluation showed no serious mental problem and counsel's own observations suggested to counsel no deficiencies in Lawson's intellect or thought processes.

This Court should give little credence to the remote-in-time affidavit of Dr. Royal concerning Lawson's mental state and the availability of mitigating evidence in considering whether counsel acted reasonably. The State suggests that Royal's findings can best be characterized as an example of the fact that "unfortunately, in today's society, experts can be found to render 'scientific' opinions on either side of any question." Knott v. Mabry, 671 F.2d 1208, 1212 (8th Cir. 1982) and that "affidavits like these are not uncommon, especially in capital cases. They are an unfortunate though understandable occurrence. It seems that when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism." Herrera v. Collins, ___ U.S. ___, ____, 113 S.Ct. 853, 872 (1993) (O'Connor, J., concurring). Moreover, despite what Dr. Royal now opines, what was available in 1981 to

the lawyers is far different. As noted, the lawyers were dealing with a man found competent, who acted rationally and who appeared intelligent and stayed involved with his attorneys in trying to win the case at the guilt stage of the trial.

In this case, there was no evidence of counsel failing to do any investigation at all, but rather eagerly latching on to the comments of a noticeably morose and irrational client. Blanco v. Singletary, 943 F.2d at 1502; Martin v. Maggio, 711 F.2d at 1280. Likewise, counsel here had no reason to believe their client retarded or experiencing serious mental difficulties as was true in Thompson v. Wainwright, 787 F.2d at 1451 and Kenley v. Armontrout, 937 F.2d at 1306-09. Counsel here followed up on all reasonable lines of investigation, including investigation of mental health evidence, not specifically foreclosed by their client prior to the client's announcement that he did not desire any presentation of mitigating evidence and that he desired the death penalty. Thus, this case does not conflict with the holdings of Kenley v. Armontrout, 937 F.2d at 1306; Gray v. Lucas, 677 F.2d 1086, 1093-94 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (A client's desire not to use character witnesses does not foreclose, but does limit, counsel's duty to investigate) or Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (Statement that he did not wish witnesses to cry for him not a waiver of character witnesses). In short, the cases cited by Lawson do not conflict with the District Court's holding in

this case, but rather, are fully in harmony with the decision of the District Court. There is no conflict among the circuits and no reason to grant certiorari to review this rather pedestrian issue involving a claim of ineffective assistance of counsel.

II. THE INSTRUCTIONS GIVEN IN LAWSON'S CASE ARE NOT VIOLATIVE OF MILLS V. MARYLAND, 486 U.S. 367 (1988) OR MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990), EVEN ASSUMING RETROACTIVE APPLICATION OF MILLS AND MCKOY TO CASES FINAL WHEN THOSE OPINIONS ARE ANNOUNCED.

As the second basis for demanding that certiorari issue, Lawson claims that the penalty phase instructions given in this case violated Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990) by implicitly requiring jury unanimity as to the finding of mitigating circumstances, even though neither the instructions nor the verdict form mentioned a unanimity requirement to find mitigation and even though no written findings as to the presence or absence of any particular mitigating circumstances were required by the instructions or verdict form. Lawson asserts not only that this case, but all other cases determined by the Fourth Circuit not to be infected with Mills/McKoy error are erroneously decided and are in serious conflict with the decisions in other circuits. He asserts this Court should use this case to resolve the alleged split among the circuits and other courts on this issue. However, the Fourth Circuit has not ruled erroneously on this issue, there is no

substantial split of authority concerning the scope of Mills and McKoy and this case certainly is an improper vehicle to use to resolve any such differences on this matter.

This case was final as of May 20, 1985, well before the announcement of the new rule in Mills. Lawson v. North Carolina, 471 U.S. 1120 (1985). Since Mills and McKoy announced new rules of law and do not represent watershed rules within the second exception explained in Teague v. Lane, 489 U.S. 288 (1989), these cases are not retroactive to cases which were final when the decisions were announced. Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992) (Mills/McKoy announce new rules and are not within the second exception to the Teague non-retroactivity doctrine as to final cases); Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 (3rd Cir. 1991)(Sloviter, J., concurring); Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala.), aff'd, ___ F.2d ___ (unpublished), stay and cert. denied, ___ U.S. ___, 111 S.Ct. 1 (1990); but see Williams v. Dixon, 961 F.2d 448 (4th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 510 (1992) Thus, the final nature of this case makes it an inappropriate vehicle for a certiorari grant to resolve the reach of any cases concerning Mills or McKoy.

Lawson argues that because the State did not raise Teague as a defense in its original answer to the habeas petition in the District Court, the State is foreclosed from doing so before this court. Lawson's assertion is feckless. The State moved to

amend its answer in the District Court to raise a Teague defense and was permitted to do so by the District Court well prior to the District Court's ruling on the Mills/McKoy issue. The District Court relied in part on the non-retroactivity of Mills and McKoy in for denying relief on this issue. Alternatively, the District Court found the instructions uninfected by Mills/McKoy error. On appeal to the Fourth Circuit, Lawson complained that the District Court had abused its discretion in permitting the State to amend its answer to allege non-retroactivity. The State responded the amendment did not constitute an abuse of discretion. The Fourth Circuit, however, consistent with its prior panel decision in Williams v. Dixon finding Mills to be retroactive, dealt only with the merits of the claim, finding no Mills/McKoy error. Thus, the State raised this defense in a timely manner in the District Court and discussed it in the Fourth Circuit as well. More importantly, as Schiro v. Farley, ___ U.S. ___, No. 92-7549 (1994) makes clear, the State, as respondent, is entitled to rely on any legal argument in support of the judgment below. Where, as here, the State is raising this defense in its brief in opposition, the State has not waived its right to rely on the doctrine of Teague non-retroactivity before this Court.

Even assuming retroactivity of Mills and McKoy to cases final when these decisions were announced, this case is not infected with Mills/McKoy error. In this case, the jury was

instructed that it had to be unanimous to find the existence of the aggravating circumstances proffered, that it had to be unanimous to find that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty, and that the jurors had to be unanimous in finding that the aggravating circumstances outweighed any mitigating circumstances found. By contrast, the jury was not instructed, and the verdict sheet did not require the jury to find the presence of any proffered mitigating circumstances unanimously. (Respondent's Appendix E, 11-14; Appendix F, 2) The Judge instructed the jurors peremptorily that they all must find the existence of certain uncontested matters in mitigation. (Respondent's Appendix E, 13-14) However, they were not required to answer "yes" or "no" on the verdict sheet after each item in mitigation. Indeed, the jurors were not required by the instructions or the verdict sheet to make any specific findings as to mitigation on the verdict sheet except to answer generally that some mitigation was found or not found to exist. (Respondent's Appendix E, 11; Appendix F, 2) There was no general overarching unanimity charge given that all issues must be found unanimously. Rather, the Court only required unanimity as to the three other sentencing issues, not the issue dealing with the finding of mitigation. (Respondent's Appendix E, 6).

Mills and McKoy both dealt with instructions which explicitly required unanimity in the finding of mitigating

circumstances. Here, by contrast, the capital sentencing instructions did not explicitly require the finding of individual mitigating circumstances unanimously and, indeed, did not require any written findings answering "yes" or "no" concerning the existence or non-existence of the individual mitigating circumstances at all. This is in stark contrast to the required unanimity as to the existence or non-existence of matters in aggravation, as well as the other two sentencing questions. In Maynard v. Dixon, 943 F.2d 407, 418-420 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1211 (1992), the Fourth Circuit, in an opinion authored by Circuit Judge Dixon Phillips, held the instructions in Maynard not to raise Mills/McKoy concerns. Circuit Judge Phillips wrote:

> We think a plain reading of the verdict form and the jury instructions indicates that the jury was not given the impression that its conclusions on mitigating circumstances must be unanimous. For one, the word "unanimously" is conspicuously absent from the verdict form question on mitigating circumstances. Equally important, the court's instructions in mitigating circumstances conspicuously lack any mention that the jury must "agree unanimously."

943 F.2d at 419.

This reasoning is equally applicable to the present case before the Court. Given the express use of unanimity in instructing on some of the issues, its absence would surely be significant to the jurors when determining how to view the

mitigating evidence. Thus, there is no reasonable likelihood that a juror might have understood he or she was precluded from considering a mitigating circumstance unless the factor unanimously was agreed upon by all twelve jurors. See Boyde v. California, 494 U.S. 370, 380 (1990) ("Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.")(emphasis added). Under the Boyde standard, the instructions given in this case fail to show error pursuant to Mills or McKoy.

Lawson cites this Court to a study of mock jurors conducted by a social scientist as proof that jurors would have understood the instructions in this case to impute a unanimity requirement. However, such studies are irrelevant to this legal question. McDougall v. Dixon, 921 F.2d 518, 532-33 (4th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2840 (1991); Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993). Indeed, a panel of the Fourth Circuit held that same instructions which were the subject of the Luginbuhl study did not violate the Mills/McKoy rule since the "jury was not instructed that its findings on mitigation must be unanimous." McDougall v. Dixon, 921 F.2d at 539. McDougall was executed in 1991, after this Court denied certiorari review. McDougall v. North Carolina, ___ U.S. ___, 111 S.Ct. 2840 (1991). If the sentencing instructions in McDougall were distinguishable

from Mills and McKoy sufficiently to permit execution in that case, then the Luginbuhl study ought have even less persuasive force in this matter where, as noted, the jurors were not even instructed to make written findings as to the presence or absence of particular mitigating circumstances.

Lawson's citation to Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), and Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), cert. denied sub nom., Kubat v. Greer, 493 U.S. 874 (1989), as well as the two state cases do not manifest a serious conflict among the circuits on this issue. In Kubat, the Illinois trial court's instructions required unanimous agreement as to the sufficiency of the mitigating factors to preclude a death sentence. That challenged instruction raises an issue which is not the same as whether or not a juror would understand silent instructions on determining the existence of mitigating circumstance to impute a unanimity requirement. Likewise, in Mak v. Blodgett, supra, the issue addressed in passing by the Ninth Circuit concerned whether the state court's prior jury instructions and verdict form, which required a unanimous verdict, both for death or life, erroneously encouraged the jury to vote for the death penalty. In particular, one of the challenged instructions misstated the law by informing the jury that it had to be unanimous before they could answer "yes" to the question whether there were sufficient mitigating circumstances to warrant leniency. The Ninth Circuit noted the instructions combined to improperly emphasize to the

jury that unanimous agreement was required not to impose the death penalty. Mak v. Blodgett, 970 F.2d at 625. Neither Mak not Kubat concern whether sentencing instructions similar to the ones now before this court might reasonably be interpreted to require unanimity in finding the presence of the mitigating circumstances. Mak does not set up a significant split in the circuits for yet another reason. As the Ninth Circuit acknowledged, since the trial in Mak, Washington State revised its sentencing instructions so the claimed error in Mak cannot affect many pending cases in Washington state. The determination of the issue was not necessary to the determination in Mak since the case was going back for a new sentencing hearing based on the issue of ineffective assistance of counsel.

The two state cases cited also do not set up a significant conflict among the Fourth Circuit and other courts. In Engberg v. Meyer, 820 P.2d 70 (Wyom. 1991), a closely divided court "articulating dictum in a case in which by the majority's own admission, 'we need not decide' the issue, and relying upon a dissenting opinion" held that the instructions on mitigation given in that case might have imputed a unanimity requirement into the sentencing instructions. Engberg v. Meyer, 820 P.2d at 168 (Thomas, J, and Brown, C.J., dissenting) However, Wyoming had changed its instructions to be explicit as to the finding and rejection of mitigation. Thus, Engberg, which had been reversed on another penalty phase issue, represents only dictum as regards

the Mills/McKoy issue and impacts, at most, one other case in Wyoming. In State v. Brantley, 427 S.E.2d 758 (Ga. 1993), the Georgia Supreme Court held that instructions which required the jury to write out and have the jury foreman sign all mitigating factors found by the jury implicated Mills/McKoy concerns. Those instructions are too dissimilar to the instructions given in Lawson to constitute a serious split of authority. Moreover, in Georgia it is not necessary that jurors list the mitigation found and in most cases this type of listing is not required. Thus, the Court's holding in Brantley will not impact any other cases now pending in Georgia since its standard instructions do not require the jurors to make such findings.

The conflicts among the circuits, then, identified by Lawson, are not serious or on-going. The identified differences do not require the grant of certiorari to resolve the issues. The decisions of the Fourth Circuit generally and in this case particularly are in harmony with the decisions rendered in the other circuits on this precise claim. Lawson v. Dixon, 3 F.3d at 754; McDougall v. Dixon, supra; Gardner v. Dixon, 966 F.2d 1442 (4th Cir. 1992)(unpublished), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992); Gardner v. Dixon, 979 F.2d 847, No. 92-4013 (4th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992); Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1211 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306-08 (3rd Cir. 1991), cert. denied, ___

U.S. ___, 112 S.Ct. 624 (1991); Kordenbrock v. Scroggy, 680 F.Supp 867, 892-93 (E.D. Ky. 1988), aff'd, 889 F.2d 69 (6th Cir. 1989), vacated and rehearing en banc granted, 896 F.2d 1457 (6th Cir. 1990), rev'd on other grounds, 919 F.2d 1091 (6th Cir. 1990)(en banc) (Nine of the thirteen judges of the active 6th Circuit agreed the instructions given in Kordenbrock did not implicate Mills/McKoy error: 919 F.2d 1110, 1120-21), cert. denied, ___ U.S. ___, 111 S.Ct. 1608 (1991); James v. Whitley, 926 F.2d 1433, 1446-48 (5th Cir. 1992). Thus, the decision in Lawson is in conformity, not conflict, with the majority of other courts which have adjudicated this issue. There is no need to take this case since it does not raise an important issue with any significant conflict among the circuits.

Finally, even assuming the instructions in this case imputed unanimity, any error is harmless. Lawson cannot demonstrate that any such error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993). In this case the mitigating evidence presented was de minimus. The Supreme Court of North Carolina, in a unanimous opinion, noted "defendant offered little in mitigation of the murder." State v. Lawson, 314 S.E.2d 493, 503 (N.C. 1984). The trial judge peremptorily instructed the jurors they must give effect to the identified statutory mitigating circumstances. The other circumstances Lawson now attempts to wring from the guilt phase evidence are so mundane as to be of no

worth whatsoever. The identified evidence at most shows that Lawson, when he desired to do so, behaved in a normal fashion. This paucity of evidence, when arrayed against Lawson's execution style slaying of Wayne Shinn and the attempted murder of Buren Shinn, and his arrogant demand for the death penalty, supports a harmlessness finding beyond a reasonable doubt, much less within the harmlessness standard set out in Brecht.

In sum, the instructions in this case do not violate the dictates of Mills or McKoy. Further, there is no significant conflict among the courts on the scope of Mills and McKoy and any variations at all do not raise an important question which requires this Court to grant certiorari in this case to resolve the issue.

III. THE FOURTH CIRCUIT PROPERLY HELD LAWSON UNENTITLED TO A FURTHER EVIDENTIARY HEARING IN FEDERAL COURT CONCERNING WHETHER HE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION DURING HIS SENTENCING HEARING.

As the third basis for asserting that this Court should issue its writ, Lawson apparently asserts that the Fourth Circuit, in affirming the unpublished opinion of the District Court, erroneously held a defendant had the right to waive the presentation of mitigating evidence in a sentencing phase hearing. He also apparently asserts that the in-court hearing during the sentencing hearing was insufficient to show a knowing

and voluntary waiver. Finally, he asserts the Fourth Circuit, employing an inappropriately high evidentiary standard, improperly denied him an evidentiary hearing in federal court on whether or not he knowingly and voluntarily waived his rights to a "reliable" sentencing hearing, assuming he had the right to restrict the presentation of mitigating evidence. Lawson asserts this holding places the Fourth Circuit at odds with the other circuits on the standard a petitioner must show to be permitted an evidentiary hearing on his claims. Lawson is mistaken. There is no real split of authority among the circuits concerning the right of a rational defendant to order counsel not to present mitigation and to demand the death penalty. A further evidentiary hearing in this matter was not denied due to the improper use of an overly burdensome standard, but rather because the record already was fully developed on the relevant aspects of the claim.

In this matter, Lawson, after consultation with his attorneys over an extended period of time, and after having the sentencing proceedings and his right to present mitigation evidence explained to him, determined he preferred the death sentence to life imprisonment. Accordingly, at his sentencing hearing, before the judge but out of the presence of the jury, Lawson was sworn and then questioned by counsel in front of the Court concerning this decision. Mr. Lawson acknowledged he had a G.E.D. diploma and that he read a great deal. He acknowledged

that he had discussed this issue with his counsel on at least five or more occasions at great length, that his lawyer had explained the function of aggravating and mitigating circumstances, and specifically told him that it was in Lawson's benefit for the jury to consider mitigating circumstances, and that the jury then had the duty of determining whether to give life or death. Lawson acknowledged that his counsel had never failed to answer any question he had about the sentencing proceeding. Lawson then read aloud and swore to the following paper writing:

> I, David Lawson, acknowledge that I am on trial for the murder of Wayne Shinn and the shooting of his father, Buren Shinn, along with the breaking and entering of Wayne Shinn's home on December 4, 1980. I realize that the State of North Carolina is seeking the death penalty. I have spoke with my attorney James C. Johnson, Jr., on at least five separate occasions and told him that should I be found guilty, then in the second trial dealing with punishment, I wish to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty that a life term. I understand my right to a second trial in which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

(Respondent's Appendix B, 1)

At counsel's request the Judge then inquired of Lawson if that were indeed his wish and reminded him of his absolute right

to testify and to offer evidence at this stage of the trial and that the jury would nevertheless weigh both aggravating and mitigating evidence present from the record. The Court further inquired if Lawson understood the things the Court had said. Lawson acknowledged he did. He then swore to the document which he had read in open court and signed and further acknowledged that the paper writing is true, correct and expressed Lawson's desire in regard to sentencing.

The jury then returned to the courtroom and Lawson took the stand. Lawson then told the sentencing jury he desired the death penalty. Mr. Johnson extracted some evidence in mitigation from Lawson for the jury's consideration including his insubstantial criminal record, and that he had assisted the authorities in a past case. The State briefly cross-examined Lawson on some guilt phase issues. Mr. Johnson, contrary to Lawson's wishes, argued that Lawson should receive a life sentence. The jury, after a little over a half hour, returned a binding recommendation that Lawson be sentenced to death. (Respondent's Appendix E, 17)

Lawson now apparently suggests that his action in demanding the death sentence and limiting his counsel in the presentation of mitigating evidence is invalid since it is against public policy to permit a defendant to forego the presentation of mitigating evidence. Neither this Court or any of the other circuits have held a competent defendant is precluded from determining not to put on mitigating evidence or to request the

death sentence. King v. Lynaugh, 868 F.2d 1400 (5th Cir. 1989), cert. denied, 489 U.S. 1099 (1989); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988); Autry v. McKaskle, 727 F.2d 358 (5th Cir.), cert. denied, 465 U.S. 1085 (1984); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993). Thus, the decision of the Fourth Circuit is in conformity with the other circuits in affirming a finding that the right to forego the presentation of evidence or to demand the death penalty remains the right of a rational defendant to choose.

The in-court examination under oath of Lawson by counsel and the trial judge together with the sworn statement signed and acknowledged by Lawson as representing his desire more than satisfies any explicit on-the-record waiver requirements this Court or any of the circuit courts have required in similar circumstances.

Voluntariness for purposes of a guilty plea is satisfied when a prisoner has adequate notice of the offense and the constitutional protections he is waiving. Henderson v. Morgan, 426 U.S. 637 (1976) Here, the in-court dialogue between the judge and Lawson and Lawson and his attorney shows he knew the sentencing possibilities and also of his right to present mitigating evidence to be weighed against any aggravating circumstances. He acknowledged that his counsel had tried to dissuade him from the course he was taking and that counsel had

answered all questions asked concerning the procedure. Thus, the in-court inquiry by the Judge and counsel was sufficient to protect Lawson's rights and is largely comparable to the type inquiry other circuit courts have found sufficient. See King v. Lynaugh, 868 F.2d at 1404.

Lawson's main assertion on this issue is that the Fourth Circuit improperly denied Lawson a right to have an evidentiary hearing in the federal courts on his contention that any waiver of his right to what he characterizes as a "reliable" sentencing hearing was not intelligent and voluntary. Lawson suggests that the Fourth Circuit improperly used the standard for determining the need for an evidentiary hearing in habeas review on alleged lack of competence to be tried set out in Card v. Dugger, 911 F.2d 1494, 1519-20 (11th Cir. 1990) and Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987) to determine whether an evidentiary hearing was necessary in federal court to resolve the issue of whether the waiver by Lawson of his right to present mitigating evidence was voluntary and intelligent. Lawson misreads the opinion of the courts below and ignores the basis upon which he made the assertion of no knowing waiver in his habeas petition.

Lawson asserted in his habeas petition that due to his alleged incompetency and the misinformation supposedly given him by his attorneys on parole eligibility, he did not knowingly and voluntarily waive his right to present mitigation. Since he premised a major part of his claim of a non-knowing waiver on his

alleged incompetency, the Card/ Fallada standard obviously was appropriate to deal with that part of the claimed need for an evidentiary hearing. The test for competency to stand trial and knowingly to waive other constitutional rights is the same. Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680 (1993). Since the competency standard is the same for a knowing waiver of known constitutional rights and to stand trial, Lawson cannot argue that the Court may hold him to the Card standard to prove entitlement to an evidentiary hearing on competency to stand trial, but that another test should be used to determine whether to have an evidentiary hearing on whether his alleged mental incompetency made his purported waiver non-voluntary. Thus, as to allegation that he did not knowingly and voluntarily waive his right to present evidence due to incompetency, the Card standard was the proper standard to use to determine the need for a further evidentiary hearing.

Lawson premised the other part of his claim to a non-knowing waiver on allegedly improper advice given him by his attorneys that he would have to serve 180 years before becoming eligible for parole. However, the basis for the last-stated part of this claim was already in evidence from the state court evidentiary hearing. Thus, but for the overarching claim of incompetency, the other material upon which this claim was grounded had been fully developed in state court. The standard used to determine the need for an evidentiary hearing as to this material is

whether the record, viewing the evidence in the light most favorable to Lawson, shows there is no genuine issue of material fact which would have warranted an evidentiary hearing. Blackledge v. Allison, 431 U.S. 63, 80 (1977). In this case, the record does not show a genuine issue of material fact which warrants an evidentiary hearing on the voluntariness of the waiver of right to present mitigating evidence.

The trial transcript, the uncontradicted evidence from trial counsel at the Motion for Appropriate Relief hearing, as well as the taped conversation between Lawson and his trial attorney introduced during the Motion for Appropriate Relief hearing show Lawson's decision to request death if the jury thought he was guilty was an informed choice by a rational person and was not based on misinformation given Lawson by his attorneys about parole eligibility. Both trial counsel explained the meaning and nature of aggravating and mitigating factors and gave Lawson copies of the relevant portions of the capital sentencing statute to study. Counsel explained the balancing proceedings to Lawson and had repeated conversations with him to attempt to dissuade Lawson from demanding the death penalty. The state court finding on this issue, entitled to a presumption of correctness, is that the attorneys "did fully advise the defendant concerning the elements of the offenses, the maximum punishment that could be imposed, and the aggravating and mitigating factors involved in the sentencing process"

The taped conversation made between Lawson and one of his lawyers prior to trial which was introduced into evidence during the Motion for Appropriate Relief proceeding, the uncontradicted testimony of James C. Johnson at that hearing, and the sentencing colloquy itself negated any need for an evidentiary hearing on whether or not Lawson fully understood the nature of a sentencing hearing or had been misinformed about parole.

The taped conversation shows that Mr. Johnson did not tell Lawson he would have to serve 180 years before he would be eligible for parole. Rather, he told him the whole group of charges Lawson faced would "max at about 180-some odd years. . . that is, if you were given a life-plus-plus on the sentence." (Respondent's Appendix D, 35-36) This is not a misleading approximation. In 1981 the maximum sentence for an aggravated assault was 20 years, N.C.Gen.Stat. §14-32(a), a breaking and entering, 10 years, N.C.Gen.Stat. §14-54 (1979), and a life sentence, while indeterminate, was considered approximately 100 years for the purposes of parole eligibility. N.C.Gen.Stat. §15A-1371(c)(1978) (A prisoner serving a life sentence becomes eligible for parole after 20 years, which is considered 1/5 of the maximum permitted by law for the offense). The parole eligibility under these charges would be around thirty years.

Lawson subsequently talked on the tape about the lack of quality of life in prison and Mr. Johnson stated. "Well I can understand with no chance of parole..." and Lawson interjected

"one hundred and eighty years? I doubt if I outlive it." (Respondent's Appendix D, 39) This quotation, standing alone, might have supported Lawson's factual assertion that he made his sentencing decision due to misinformation about parole. However, later in the same conversation, Lawson clarified that he understood that his possible parole eligibility was not 180 years, but rather, approximately thirty. He states:

> But what can you look forward to? Getting out in 30 years, old man? I'm in the prime of my life. I mean I talked to some people about it. They saying 'well you know don't ever give up.' Thirty years? I know people that have a family and got what they wanted when they got out after they spent all this time, you know, but I just don't think I would want to.

(Respondent's Appendix D, 48) This quotation clearly indicates that Lawson was unwilling to spend thirty years--his likely parole eligibility time--in prison, so that the comment about 180 years simply does not raise a factual issue which required an evidentiary hearing to resolve whether his decision to forgo presentation of mitigation and to request the death penalty was based on a misunderstanding of his possible parole eligibility.

Thus, the record shows that there is no material factual dispute about what the attorneys told Lawson, of what matters Lawson was aware, including the scope of sentencing hearings, prior to determining to demand the death penalty. Under these circumstances, once the proffer as to Lawson's competency failed to require an evidentiary hearing, the rest of this claim failed

as well. This was not due to the Fourth Circuit requiring an impermissibly high standard of pleading before granting an evidentiary hearing. Rather, simply on the well established principles of summary judgment jurisprudence, the record did not require the taking of further evidence since the undisputed evidence in the record resolved the claim. Certiorari ought not issue.

IV. THE FOURTH CIRCUIT COURT OF APPEALS DID NOT CREATE AN IMPROPERLY HIGH STANDARD TO DETERMINE WHETHER OR NOT AN EVIDENTIARY HEARING WAS NECESSARY IN FEDERAL COURT ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL. RATHER, THE COURT SIMPLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT BASED ON A FULLY DEVELOPED RECORD NO FURTHER HEARING WAS NEEDED.

As his last basis for demanding this Court issue its writ, Lawson asserts that the Fourth Circuit has adopted a uniquely high standard of proof which a petitioner must meet prior to being entitled to an evidentiary hearing on a claim of ineffective assistance of counsel due to an alleged failure to develop and present mental health mitigating evidence. Lawson misreads the opinions below. When read together with the unpublished opinion of the District Court in this case, it is obvious that the Fourth Circuit had not developed a new and unduly rigorous standard for the right to an evidentiary hearing in federal court on an ineffectiveness claim. Rather, the Court simply affirmed the unpublished opinion of the District Court

denying a hearing in this case since the record already was adequately developed.

The opinion of the District Court specifically acknowledges Strickland v. Washington, 466 U.S. 668 (1984) as the proper standard to use, asserts that the summary judgment standard is the one used to determine the necessity for a further evidentiary hearing in federal court. The District Court opinion cites to other effective assistance of counsel cases from other circuits in making its ruling on the effectiveness of counsel in not obtaining additional mental health examinations for Lawson after the competency evaluation had occurred: Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986) (Counsel might have been ineffective in failing to obtain a mental health evaluation for this petitioner who demanded the death penalty where there was significant evidence of incompetency); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988) (Demand for the death penalty by a client, alone, not a sufficient basis to hold counsel ineffective for failing to move for a mental evaluation.) Thus, the District Court order clarifies that no improper barrier to an evidentiary hearing has been erected by the federal courts in this case.

The District Court employed the high standard set out in Card v. Dugger, 911 F.2d at 1519-20 and Flugence v. Butler, 848 F.2d 77, 79 (5th Cir. 1988) only to determine whether an evidentiary hearing was necessary on the allegation that Lawson

was incompetent to be sentenced and the related allegation that Lawson was not competent to waive a sentencing hearing. The ineffective assistance of counsel claim was bound up with the competency claim to the extent that if Lawson was competent to waive his right to present mitigation, counsel cannot be held ineffective for following his wishes. King v. Lynaugh, 868 F.2d at 1403-05; Autry v. McKaskle, 727 F.2d at 362; Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987), cert. denied, 484 U.S. 1036 (1988). However, the Card/Fallada standard was not used to evaluate the need for an evidentiary hearing on the issue of ineffectiveness.

Here, as is true of the need for an evidentiary hearing on the waiver issue raised in Claim III, the record before the federal hearing court was fully developed in the state court proceedings except for some documents which the federal court ordered the record expanded to include. This material fully documented Lawson's conversations with counsel about his mental status, and his alleged lack of use of drugs. The record included counsel's observations of Lawson's mental agility and his general intellectual functioning. The record also included the competency evaluation of Lawson conducted by the Dorothea Dix Hospital staff prior to trial. This report, which raised no serious concerns about Lawson's mental abilities, was received by trial counsel and fully reviewed with Lawson prior to Lawson's determining to request the death penalty.

Once it was determined that the record raised no serious claim that Lawson was incompetent, no further hearing on the issue of ineffectiveness was needed. The record showed counsel were dealing with a seemingly rational man who committed a very callous murder and an attempted murder to cover up an economic crime since he did not desire to go to prison. There was nothing seemingly bizarre about the crime or Lawson's reasons for committing it. The record showed counsel had no reason to believe Lawson was impaired since the Dorothea Dix Hospital report showed no serious mental disorder. The record showed little basis for counsel to believe there was psychological evidence present which would mitigate a remorseless crime their client told them was committed to cover-up a breaking and entering which he committed to supplement his income. Byrne v. Butler, 845 F.2d at 513. The well developed record made a further hearing unnecessary.

Clearly then, the District Court relied on established principles of summary judgment law and decisions on ineffective assistance of counsel, not on an inappropriately high standard of review in declining to permit a further evidentiary hearing in this case. The record affirmatively foreclosed the need for a further hearing since no material fact was at issue.

Any imprecision in the language employed by the Fourth Circuit in its affirmance of the District Court's decision not to permit a further evidentiary hearing, is clarified when read with

the District Court's unpublished opinion. There is no new standard created by this case which conflicts with other circuits concerning when evidentiary hearings are to be held in federal habeas review. Thus, this claim, like the others presented by this petition, fails to raise a certiorari worthy issue.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
FEB 8 1994
OFFICE OF THE CLERK

No. 93- 7657
No.-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, Warden, Central Prison,
Raleigh, North Carolina,

Respondent.

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

INDEX

A. Motion and Order for a Competency Evaluation for David Lawson.

B. Affidavit from David Lawson on his desire not to present mitigating evidence dated June 6, 1981.

C. Competency Evaluation Summary on the testing conducted at the Dorothea Dix Hospital on David Lawson dated February 4, 1981.

D. Portions of the testimony of James C. Johnson, Jr. at the May 26, 1987 State Motion for Appropriate Relief Hearing,including a transcription of a taped conversation between Mr. Johnson and Lawson which occurred prior to the May, 1981 trial of this matter.

E. Portions of the trial transcript containing the sentencing instructions given at the trial of this matter on June 6, 1981.

F. The verdict form used during the sentencing hearing in State v. Lawson on June 6, 1981.

APPENDIX A

A-1

NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

CABARRUS COUNTY

1981 JAN 27 PM 3 [illegible]

SUPERIOR COURT DIVISION
80 CR 18307

CABARRUS COUNTY, C.S.C.

BY [illegible]

State of North Carolina)
)
VS.)
)
David Lawson,)
Defendant)

MOTION FOR MENTAL EVALUATION

NOW COMES the Defendant's Court Appointed Attorney, James C. Johnson, Jr., and respectfully moves the Court for an Order pursuant to G.S. 15 A 1002 (b) 2 for a psychological evaluation of the Defendant in order that a determination be made as to whether or not he is mentally competent to proceed to trial.

1. That this petition is made based on the fact that the Defendant has developed difficulty in his ability to communicate with his attorney, is suffering depression, lapse of memory, anxiety and a general lack of ability to understand the nature and seriousness of the charges against him.

WHEREFORE, the Defendant through his attorney respectfully moves the Court for an Order granting a psychological evaluation of the Defendant at the Dorothea Dix Hospital pursuant to G.S. 15 A 1002 (b) 2.

This, the 27th day of January, 1981.

James C. Johnson

James C. Johnson, Jr.
Attorney for Defendant

David Lawson

David Lawson
Defendant

JOHNSON, BELO & PLUMMER
ATTORNEYS AT LAW
CONCORD, N. C.

A-2

NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

CABARRUS COUNTY

1981 JAN 29 PM 2

SUPERIOR COURT DIVISION
80 CR 18307

CABARRUS COUNTY, C.S.C.

BY [illegible]

State of North Carolina)
)
VS.)
)
David Lawson,)
Defendant)

ORDER FOR MENTAL EVALUATION

THE COURT having been presented a Motion seeking a mental evaluation study to be conducted on the Defendant to determine his capacity to stand trial by the petitioner, defense attorney, and the Court having considered the Motion and evidence, makes the following finding of facts:

FINDINGS OF FACTS

1. That the Defendant is presently charged with the criminal offense of murder.

2. That the Court has not set a bond for the Defendant.

3. That the Defendant is 25 years of age and is a resident of Cabarrus County.

4. That the petitioner, Defendant's attorney, has consulted with the Defendant and found the Defendant to be in such a mental state that the Defendant cannot adequately assist defense counsel with the preparation of the Defendant's defense.

5. That the Defendant has exhibited the following characteristics in conduct: inability to communicate with his attorney, depression, lapse of memory, anxiety, and a general lack of ability to understand the nature and seriousness of the charges against him.

6. That the Court further finds as a fact that the foregoing conduct on the part of the Defendant raises serious questions as to his present mental capability to advise his attorney and to stand trial and that a mental evaluation study should be made on the Defendant to determine his capacity to stand trial.

7. That the Court finds that a mental examination pursuant to G.S. 15A-1002 (b) (2) (committment to state mental hospital for sixty days) is required and in the best interest of the Defendant.

JOHNSON, BELO & PLUMMER
ATTORNEYS AT LAW
CONCORD, N. C.

CONCLUSION OF LAW

The Court concludes as a matter of law that it has jurisdiction of the subject matter, Defendant and has the authority under the provisions of Chapter 15, Article 56 of the General Statutes to enter the within Order.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED

1. That the Defendant is to be given a mental examination to determine his capacity to proceed to trial and assist his attorney in the preparation of the defense of the Defendant.

2. That said mental examination shall be conducted under the provisions of::

(a) G.S. 15A-1002 (b) (2) and that the Defendant shall be committed to Dorothea Dix Hospital in Raleigh, North Carolina, a state mental hospital for a period not to exceed sixty (60) days. That the Sheriff of Cabarrus County, North Carolina, shall transport the Defendant to and from said facility. That the superintendent of said institution shall notify the Clerk of this Court as to the Defendant's condition and the Defendant's release date back to the Sheriff.

3. That the Defendant is to be in the custody of the Sheriff of Cabarrus County pending the examination hereinabove ordered except as may be required for the Defendant to be in the custody of the medical expert or the State hospital.

4. That a copy of the findings of the hospital shall be placed in the Defendant's file and a copy shall be made available to the Defendant's attorney.

5. That this matter is retained for such other and further orders as may be required.

This, the 29th day of January, 1981.

Adam C. Grant, Jr.
JUDGE PRESIDING

JOHNSON, RELO & PLUMMER
ATTORNEYS AT LAW
CONCORD, N. C.

APPENDIX B

6/14/81 2:30 P.M.

B-1

I, David Lawson, acknowledge that I am on trial for the murder of Wayne Shinn and the shooting of his father Buren Shinn, along with the breaking and entering of Wayne Shinn's home on Dec. 4, 1980.

I realize that the State of North Carolina is seeking the death penalty.

I have spoke with my attorney James C. Johnson, Jr. on at least five separate occasions and told him that should I be found guilty, then in the second trial dealing with punishment I wish to have my attorney seek and request the death penalty.

I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term.

I understand my right to a second trial in which the jury would consider both mitigating and aggravating circumstances.

I have never the less for some months before the trial told my attorney I do not want a life sentence but a death sentence and that I want him to take such legal steps as may be necessary to see the sentence is carried out.

This 6 June, 1981.

David Lawson
David Lawson

Sworn to and subscribed
before me this the 6th
day of June, 1981.

James C. Davis
~~Deputy Clerk~~ Judge of Superior Court

APPENDIX C

NORTH CAROLINA DIVISION OF
MENTAL HEALTH, MENTAL RETARDATION
AND SUBSTANCE ABUSE SERVICES

Dorothea Dix Hospital
Raleigh, N. C.

DDH SPR FOR

38-38-27 LAWSON, DAVID
NONE WMS COO 01-29-81
06-22-55 CABARRUS

Court File No. 80-CR-18307

PSYCHIATRIC HISTORY AND EVALUATION
AND DISCHARGE SUMMARY/AFTERCARE PLAN

SENSITIVE INFORMATION
When Requested By Consumer Must Be
Shown AND/OR Interpreted by A
Competent Clinician.
Redisclosure Prohibited By Law Without
Client Consent

Date of Admission: 01-29-81

Date of Conference: 02-03-81

Date of Discharge: 02-05-81

Correspondent: Coyle Scarborough, Father

IDENTIFYING DATA: This 25 year old, white, single male from Concord, North Carolina was admitted to the hospital as per court order of the Superior Court Division of Cabarrus County for evaluation of capacity to proceed on charges of murder.

IDENTIFICATION OF DATA BASIC TO OPINIONS: The opinions expressed in this report are based upon interviews with the patient, the result of physical examination, laboratory studies, psychological tests, and observation of his ward behavior during the time that he was in the hospital.

MENTAL STATUS ON ADMISSION: At the time of his admission to the hospital Mr. Lawson was alert and cooperative. His stream of mental activity was normal. He denied hallucinations and delusions. He reported previous suicidal thoughts and one attempt but denied any suicidal intent at the time of admission. His memory, judgment and intellect all appeared to be within average limits.

PHYSICAL EXAMINATION: Within normal limits.

LABORATORY DATA: Within normal limits.

PSYCHOLOGICAL TESTS: On IQ test Mr. Lawson scored 107. His reading grade level was at a ninth grade level or above. Mr. Lawson's Bender Gestalt figures do not suggest serious organicity. His projective drawings suggest significant psychopathology including a low self-esteem with feelings of inferiority, insecurity and inadequacy. Mr. Lawson's MMPI profile suggest anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by a tendency to be self-dramatic. He may be expected to be chronically hostile and resentful and to use projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient. Expression of hostility and depression often form a cyclic pattern. Such patients are typically self-centered and dependent with an exaggerated need for affection.

HOSPITAL COURSE: During his stay in the hospital Mr. Lawson was cooperative with hospital routine and the evaluation procedure. He did not present any management problems. He did not require any medication.

PSYCHIATRIC OPINIONS: Mr. Law is capable of proceeding to trial at the present time. He understands the charges against him, the seriousness of those charges and is capable of working with an attorney in the preparation of his defense.

MEDICAL DIAGNOSIS: None

NORTH CAROLINA DIVISION OF
MENTAL HEALTH, MENTAL RETARDATION
AND SUBSTANCE ABUSE SERVICES

LAWSON, DAVID
38-38-27

Dorothea Dix Hospital
Raleigh, N. C.

PSYCHIATRIC HISTORY AND EVALUATION
AND DISCHARGE SUMMARY/AFTERCARE PLAN
Page 2 -- 02-03-81

PSYCHIATRIC DIAGNOSES: Axis I: 309.00 Adjustment disorder with depressed mood.

Axis II: V71.09 No diagnosis.

DISCHARGE MEDICATIONS: None

RECOMMENDATIONS: That Mr. David Lawson be discharged to the custody of the sheriff of Cabarrus County as capable of proceeding to trial.

James Groce, M.D.
Forensic Psychiatrist
Forensic Unit

JG avb
2-4-81

cc: Defense Attorney
District Attorney
Presiding Judge
Mental Health Center
Patient

SENSITIVE INFORMATION
When Requested By Consumer Must Be
Shown AND/OR Interpreted by A
Competent Clinician.
Redisclosure Prohibited By Law Without
Client Consent

APPENDIX D

THE COURT: I understand it's a lot of stuff.

MS. BYERS: But we can get that xeroxed within a day of the hearing being over and get it back to you. It's just a matter of having access to the--we did not get access of this until a little while ago.

THE COURT: Okay. I was going to suggest the use of the record of the case on appeal, but that wouldn't be in line with what your motion is about. Is that right?

MR. KING: That's right.

THE COURT: Are you ready to make your opening statement? Do you propose to make one?

MR. KING: We would waive an opening statement, Your Honor.

THE COURT: Call your first witness then.

MR. KING: Call Mr. Johnson to the stand, please.

THE COURT: Now, I want to say this. I recognize that the Senator is the first witness, and I'm going to, so you'll all know to start with, I'm going to overrule any objections based on his being taken out of turn, so to speak. I'm not going to require him to wait around and be in turn. Ask everybody's cooperation on that. Any question about this, that ruling? All right.

JAMES C. JOHNSON, JR., being first duly sworn, testified as follows during DIRECT EXAMINATION BY MR. HARKINS:

Q State your name and business address for the record, please

PEACOCK CO. ATLANTIC, N.J. 07402 FORM 748

Q Mr. Johnson, on Page 571, where the State objected to a couple of questions, what were you trying to get in?

MR. ROBERTS: Well, objection, Your Honor.

THE COURT: I have no idea. What do you mean here?

MR. HARKINS: I'm trying to ascertain, Your Honor, what evidence he was trying to get before the jury.

THE COURT: You want him to read the questions that were objected to? Is that it?

MR. HARKINS: Yes, Line 18.

A All right, the question was: "And other than being one of the rowdy, good old boys, did he ever give you any trouble?" Mr. Bowers said, "The State objects." The Court sustains. Question: "Had you ever had any trouble with--" Mr. Bowers, "Objection." It's sustained. "Mr. Tucker, when he came to you, were you at work at the time?" That was when he showed up.

Q What were you trying to get before the jury on the two questions where the State objected?

A Just the fact that he had no criminal record here as far as Mr. Tucker would know.

Q Were you also trying to get in any information concerning the fact he had a good employment history?

A I really can't remember. That was part of it. I was using Tucker at that point to try to show that at least as far as he was concerned and conveyed knowledge with the Kannapolis P.D.,

that he had--that David had no criminal record.

Q Mr. Lawson had worked with Mr. Tucker at Kmart, hadn't he?

A That's my understanding.

Q Had you talked with Officer Tucker concerning David's work record at Kmart?

A To the degree that he worked there. He worked in the lawn and flower department, fertilizer department, whatever, like that, and that he was an average employee. There was nothing outstanding about that, though to my best recollection, Tucker was aware of the problems David had had in Stanly County.

Q Did you ever ask Tucker if he had ever had any problems with David of a disciplinary or other nature?

MR. ROBERTS: Your Honor, the State objects. Certainly that would not be admissible had the question been asked.

THE COURT: I don't really understand what the reason you're--what are you attempting? Which of your contentions in your motion for appropriate relief are you offering this on?

MR. HARKINS: This deals with Mr. Johnson's presentation of mitigating evidence favorable to Mr. Lawson at the trial.

THE COURT: And is it your contention that this was admissible at the trial court and the judge erred when he sustained the objection?

MR. HARKINS: No. I'm merely--

THE COURT: Is that what you--

MR. HARKINS: I'm merely trying to determine what

investi tion Mr. Johnson had conce ning this particular point and whether--

THE COURT: You didn't ask him that, did you?

MR. HAPKINS: I believe I did, Your Honor.

THE COURT: Didn't sound to me like you did, but go ahea I thought you were asking him about this transcript. Go ahead.

Q. Did you ask Mr. Tucker if Mr. Lawson had given him any problems as an employee?

A. I'm trying to call from my recollection. I asked how he had gotten along, and it was something to the effect of never having had any problems with him, or something to that effect, and he indicated he hadn't worked there that long.

Q. But you were not aware of anything unfavorable from Mr. Tucker concerning Mr. Lawson's employment at Kmart?

A. As to his employment at Kmart, no.

Q. And is that what you were trying to bring out when the State objected?

A. Not at that point. I was trying to negate any possibility of a criminal record.

Q. Prior to the trial, did you investigate David's family back ground?

A. I discussed with David at some length on more than one occasion his background. He indicated to me that he was not in close contact with relatives -- his mother and his father. Last week when you and I were discussing it, I told you I

couldn't recall right offhand whether or not David's father was dead or not. In trying to review some of this, I know that we used him as a reference on the hearing for competency and that there was some other testimony about it, but he had not, he told me--whether it's right or wrong--he told me he had not been in close proximity or relationship with his parents and I believe he used the figure five years, maybe seven years, that he hadn't had any contact, and he was upset in the sense of irritated when one of the local newspapers had contacte his mother, and he specifically told me he didn't want his people brought into this, he didn't want them bothered with it, and he had called her or she had called him. I don't recall exactly which way it went. But called to tell her that they didn't have anything on him, not to worry about it. He didn't want them brought into this because this was his situation, his problems, and he didn't want them drug into it. Now, but as to any other relatives, I can't recall him mentioning any aunts or uncles or anything of that nature as to any type of contact.

Q. Did you undertake any background search of Mr. Lawson other than what he told you?

A. I thought that was the best source I could go to, was what he told me and his attitude toward that situation. David expressed the fact that his mother had brought him up. He didn't seem to want to get into any great discussion as to his

personal relationship with his father or his mother other than the fact that he had kept his distance for a number of years, and they had, too. The other fact was that for a short period of time, he had been with a teenage group--some people might call it gangs--anyway, he and some others had been breaking into a dormitory and they got caught. He was sent for some period of time--I think he said several months, less than six, I believe. I'm just recalling off the top of my head. Sent to a camp for boys, and that he enjoyed that camp. He fished, and they let him do pretty much what he wanted to do, and he recalled that and enjoyed that experience, but that he early on decided he wanted to be on his own. That he enjoyed that. That he felt secure in that. That he did not like to have close ties with anyone, for one of several reasons. First of all, if he did anything that was inappropriate, illegal, he could rely on himself and he trusted himself and he certainly didn't trust--didn't want to rely and trust somebody else--and that he liked the fact that he was independent, that he wanted to be independent. He was proud of himself as being independent, and that he had the ability to get along in life and handle things. He expressed that very strongly, and those were the attributes--and, of course, we discussed many facets of his life, which goes into other matters, you know, what--necessarily favorable to him in this situation.

Q Did you seek to determine his medical history?

A I asked him about his general health, and he indicated to me that it was good. He worked at a sawmill a great deal. He said that was some of the hardest work he'd ever done, and he on one or two occasions discussed the fact that it took a real man to do that, and I concurred with him. That's hard, laborious work, and that was his physical side. As to his mental side, he never indicated to me that he thought he had any type of emotional or mental problem, and I formed the opinion over a period of time in talking with David that he is highly intellectual. He is not a formally educated person, but he is certainly a very sharp person. He's well read in the sense that he picks up on things, notices things, reads the newspapers, reads books. He has that kind of interest. And he had a perception of history in depth, and I thought then and I think you and I discussed last week and you and I agreed on this, that he is a very keen, intellectual person, although he is not formally educated.

Q Did you perform any investigation into any drug use in his past?

A David told me that he didn't use that stuff because that wasn't the smart way to go. That only the dummies use that. That he was smart enough to avoid that because that was a dead-end road. He also had a philosophy about gambling. That was a dead-end road, too. Only suckers gambled. And he said he didn't get into the use of drugs or things like that because

that would really mess you up. He's seen a lot of people who--one time, I think, he used loggerheads or waterheads that got into that stuff.

Q Other than questioning David, did you perform any additional independent investigation into his family background or his medical background?

A I went to Stanly County and talked to some law enforcement officers down there about David to try to get some background information, which they gave me, both about his personal and other aspects of his life, and they were consistent with what he had told me. There wasn't really a great deal of information to obtain. David was always--my investigation indicated that David had lived a very private life. He's a very private individual. He likes his own space. He doesn't like to be confined, but he likes his own private space, and he's not one of these that had developed a lot of personal inter-relationships. To the best of my recollection, I believe that the Court ordered that he receive a psychiatric evaluation at Dorothea Dix Hospital, and he did.

Q Did you move that any psychiatric evaluation be performed at any place other than Dorothea Dix Hospital?

A No, I did not.

Q Did you seek to in any way have him evaluated than at Dorothea Dix?

A No, I did not.

Q Did you--were you able to talk to any members of his family?

A I can't recall. I don't know whether I talked to his mother or father one time or not. It seems familiar to me, but I can't--I just really can't say. I'm not saying I didn't. Seems like we discussed one time something I was trying to find out, whether the actual status was divorced or not. I just don't recall. I don't recall if that was before or after the trial. It was before.

Q Did you talk to any of David's friends or co-workers here in Cabarrus County prior to trial?

A When I made the tour of the bars, I talked to some of the people that he was--what you might say acquainted with--people who knew David, people who had an acquaintance with him or he was around, to get a feel of what this man was like. Who did I have here? What was going on? And withouut letting them know I was his lawyer. "What do you think about him?" Or "What do you know about this Lawson fellow?" "Oh, well, he comes in here. Somewhat of a loner. Somewhat of a bragger. He's on his own. Man, he'll hit a lick," like men steal or rob something. He had a reputation of being a fence, more or less handling hot goods, hearsay kind of thing. There was some knowledge that he and Phyllis had some kind of relationship going, but those were the general things I picked up from the conversation of people that I discussed this with.

Q Other than David himself and the Stanly County law enforcement officers and people you may have happened to meet in the bars you frequented, was there anyone else you talked to about David's background prior to trial to assist you in your preparation?

A Other than him--I can't think right now. I can't think of anyone.

Q Did you seek to obtain any records from this adolescent confinement that you referred to that he may have had?

A No, I didn't.

Q Do you know what state that occurred in?

A I can't recall right here.

Q I believe David expressed to you a desire, if he was convicted, that he receive a death penalty. Is that correct?

A That's correct.

Q That was a matter of concern to you and Mr. Plummer?

A Obviously.

Q Did David's desire to die in any way affect your pretrial investigation of his background?

A No. Why should it?

Q I'm asking you if it did.

A No. Obviously not.

Q Is there anyone else you would have talked to in preparation for the hearing but for his desire to die?

MR. ROBERTS: Objection, Your Honor.

THE COURT: Sustained. He just said it didn't interfere with it. If you have some reason to think that's wrong--is that the reason you asked that question? It's kind of unusual.

MR. HARKINS: No, Your Honor.

THE COURT: Go ahead.

Q After Mr. Lawson indicated to you that he desired the death penalty, did that prompt you to seek any additional psychiatric evaluation of him?

A No. And there were a couple of reasons for that. As strange as it may seem, I respect that. He's a unique individua He's a very discerning person. He can be a very deceptive person. He, I would say, is one of the truest men I have ever represented in a criminal defense. He has the innate ability to have a sixth sense. In our conversations--and we had a lot of good ones--in our conversations, my respect for him as to his mental capacity, his educational capacity grew. He was the type of person you could talk with on a genuine, intellectual basis. We had interesting discussions about reincarnation. That's not necessarily weird and unpopular. There's a lot to that. Duke has been doing a lot of research on that. Extrasensory perception. David believed he had been here before. We discussed that. "If this goes to sentencing and everything and I get put to death, I'll be back to see you." We joked about that. He has the ability to perceive what kind

of reaction he wants out of somebody else. He reads people well. When he started into this discussion about why he wanted to be put to death, you could tell that this was a man who had not just suddenly come up with this far-fetched idea. He talked about how he had thought about it, how he had considered it. He talked about the fact that the qualitative value of life to him is extremely important. We talked about Kathleen Quinlan, when her parents were trying to get the respirator and everything off. He told me, he said, "Jim, quality of life is far more important than quantity of life." He told me he liked to have money. He liked to be thought of sort of on the top rung. He liked the ladies. He liked the good life. And if he could not have that qualitative value in his own life, he was no good to anybody, in particular to himself. We discussed this on a philosophical basis on any number of occasions. I wanted to make sure that he clearly was telling me what he honestly felt, and there was no question in my mind, as many times as we went over that, as we discussed the philosophy, discussed religion and how that relates to it--you know, maybe some people may think that's an abnormal request and desire. David, to me, had that thought through in such a complete and philosophical way, he knew what he was saying and doing. He was convinced of his beliefs.

Q Did you ask him if he would submit to the psychiatric evaluation concerning that matter?

A We discussed when he went down--

Q Excuse me. Went down where?

A To have the psychiatric evaluation by the State through the motion filed. He asked me the question, "Do you think"--if I recall correctly. I can't remember. "Do you think I'm crazy?" I said, "No, I don't think you're crazy. I just wanted to make sure we get some kind of help if there is any problem there." And we went through what he might expect, you know, take him down, be intereviewed, and this kind of stuff. I was concerned about the fact that if they got to probing too deeply about what happened and what did or did not occur, what he might say, that could come back to haunt him in court. I told him the consequences of that. There was always that outside possibility that whatever you confide to those people, they could come back into court, even though we're trying to get a medical profile on him through the State, and he understood that, and he said he knew how to handle that. And so when he came back, I read the report. I believe Dr. Grose did that report. And they had some forms sent back, more like a tax form than anything else, and I sat down and went over it with him, and he very quickly pointed out that he handle himself well while he was down there and didn't say or do anything which would have jeopardized his standing in the case, and that he understood, and that he had tried to make a good impression and say only what he felt was reasonably necessary,

and so I realized that his mental processes were sharp enough and cool enough to keep the lid on anything that might damage him. And they said he was sometimes reactive and sometimes that he had a propensity to not be able to control himself. One of the things I remember there was some big guy back in the jail here, made an excellent fellow back there and down in his interviews, made excellent appearances. He never gave any trouble. One or two of these fellows, he wanted to, I think, cram them down the commode, because they were giving some static. He knew it would be in his best interest to keep a cool, low profile, so David understood that when he was in a position of control and power, he would do whatever he wanted to do, but when he was in a situation where he had to give the best impression or put his best foot forward, he knew how to handle that, too. You didn't have to go and educate him on that. His mental processes and his practice of reason and logic, I can truthfully say, he was one of the best I have ever represented.

Q You don't have any formal training in psychiatry, do you?

A I have a minor in sociology and psychology which I gained in college at Tennessee. That was my secondary minor.

Q Did you request him to have another evaluation after he made known to you his desire to receive the death penalty?

A No.

Q Did you seek to move the Court for an order having such an

evaluation?

A No, because we knew exactly where we were.

Q Did you not feel that despite your personal beliefs in the matter, an expert opinion might be useful?

MR. ROBERTS: Objection.

THE COURT: Well, overruled.

A No, I didn't then, and I don't now, because again, I come back to the thing, just like you told me last week you thought he was highly intellectual, and one of the smartest men you had ever dealt with, and I felt the same way you do. I felt it then and I feel it now. David is a very competent person. He's not an emotional con artist or something like that. He is extremely proud of the ability he possesses. We discussed in great detail the process of committing crimes and not getting caught, his professional--like any other boys. As I said to you last week, with David's capabilities, he would have been a very successful businessman, but he chose another route, and he was good at the route he chose.

Q Now, at the penalty phase, Mr. Lawson took the stand and expressed to the jury his desire to receive the death penalty. Is that correct?

A That is correct.

Q Did you present any other mitigating evidence to the jury?

A The only mitigating evidence that flowed was through the whole trial of the various aspects of what I related to you a

few momen[illegible] ago. It came out he had [illegible]o major criminal record, D-16
that and these things here, but as to say call separate individual witnesses to produce those, not at the sentencing stage. I don't know how many cases you've ever tried. I've been at this a long time. I've tried a lot of murder cases. I've had some toughies. But when a man asks to be put to death, as in this case, and he knew and I knew what we were doing, what he wanted to do, I had satisfied myself beyond a reasonable doubt that he had all of his faculties. He had thought this thing through, and he knew where he was going. When he got up and he quite literally stripped every mitigating factor that you could offer, because, you know, when a man doesn't want to save his own life, that puts you with a heavy burden to try to convince the jury over here that he's wrong, and that he shouldn't, though I tried that and I discussed that with him. I discussed it with him at some length. I said, "If you're asking to be put to death, how am I going to argue to the jury? He laughed about it, said, "You have a tough job." I said, "Yes, I sure do." The mitigating circumstances which the jury heard through the course of the trial, whatever they were, were the ones they could take in the sentencing stage, but wherever I went to find mitigation other than what you're trying to indicate here about he had a good work record, something like that, everywhere I went, I couldn't find anybod to say something that was mitigating, and I think that what's

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in the transcript, in the case file. Ms. Soden said in cross-examination with her that he was good to the babysitter, was in a sense domesticated. He wasn't Big, Bad Leroy Brown. When he found out she brought that other man home over there, he could have raised immortal hell, I argued to the jury, but he walked out with his tail between his legs, trying to counter the attitude that he was big and bad and always did mean kinds of things, but the point I'm getting at is he left very little, by his statement, to come around and mitigate, and everywhere I tried to find somebody, it wasn't mitigation.

Q. On cross-examination, had you tried to use some of these bar people up there?

A. To say what? You know, he doesn't drink too much, doesn't fight too much. Hell, he only hit that guy with a pistol one time. Gee, that's great. He could have hit him twice, but he didn't. Didn't have a lot of places to run.

Q. But you did not call any other witnesses?

A. No.

MR. ROBERTS: Objection. Repetitious.

THE COURT: Sustained.

Q. As trial counsel, did you view it as your decision as to what witnesses to call?

A. It's my ship to run.

Q. He did not prevent you from calling any other witnesses, did he?

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at least, until we have a chance for appellate review of this ruling.

THE COURT: Anything else now before the Court makes its ruling? The motion of the defendant that the examination of the principal witness, Attorney Johnson, be conducted in camera is denied. Go ahead.

Q Senator Johnson, after the probable cause hearing in this case, did you speak further with David Lawson concerning his version of what had happened in this crime?

A It's here somewhere. David--I gave him a tape initially for him to give me a feel right off the bat of what he said transpired. I read that with a great deal of interest, and then we compared that with notes that we took down at the hearing. After that, I went in and we were in this room here next to the medical center in the jail. We sat down there and I said, "Look, from a legal standpoint, I don't care whether you did this or you didn't do it, but I've got to know the truth, because if you tell me you didn't do it, then I'm going to proceed with a certain avenue of approach and tactics; if you tell me you did do it, I proceed on another avenue and approach and tactics." And I believe, if I recall correctly, it's sort of like the middle of a battle, don't come up and tell me we're out of ammunition. And I may have done it. I said, "I don't want to feel you pulling on my coat sleeve and telling me this or that. I need to know now. I need to know the truth.

At that point, he said, "All right. Let me tell you what came down." We discussed then on several occasions how he had received information, if I recall correctly, from Phyllis and that the rumor was that the Shinns were wealthy and had money and that they had things in their home of value, and that he had ridden by there on several occasions and just sort of cased the thing out, and in some fashion, either through that process or some other, he had arrived at the realization that they left home in the mornings and that there wasn't anybody around there supposedly during the day, regular daylight time. That he was low on money and he decided to make a lick. A lick means, in his terminology, to break in a place and rob somebody. He then went into great detail to describe how he had driven over there, and I believe he passed the place the first time just to peruse it one time and then came back up the road and pulled in. He had bought a crowbar, if I recall correctly, from Sear's. It was a new crowbar. He went into some detail various times--this was a combination of several conversations, Judge, over a period of time. I'm compiling them all to give you a picture of why I started approaching the case like I did. And that he knew burglar alarms--and I'm convinced he did. He's a sharp man. He knew how some of them went off by a result of even cutting the wires that supplied the power. Some of them were--he discussed one type of burglar alarm that I believe he said was powered by

some type of batteries and various other ways, and he was very familiar with that, and when he went up to the door and busted it open, he was aware that there was a burglar alarm system there but he bypassed it somehow, and it did not go off, and he was--he felt good about that. The first thing he did was he went through the house and got a pillowcase, and then he came back and he said the process was to go pick up those things that he was going to take and leave them in a central location and come back, as he went through the house, and put them in the bag and leave with them. He had gone downstairs because he was going to get some meat. One of the things he indicated to me is a lot of times when he went into a place, people had freezers and he would just take some meat because it beat going to the grocery store. He'd just bring some meat out and keep it. He went downstairs, located that, and there was a pool table down there, and in the process, he made a determination that obviously it's a lot simpler to go out the back sliding doors. There was a little cement patio kind of thing back there. He would go through there and put it in the car rather than go upstairs and go out that way. When he touched that door, that's when all hell broke loose.

MR. HARKINS: Object to that characterization.

THE COURT: Sustained.

A. That's when the burglar alarm went off. He said, "I couldn't believe it." He was at that point not only surprised,

but irritated at himself for letting that happen. I gained the impression on several conversations with him that he knew better He was more polished than that.

MR. HARKINS: Object to what counsel's impression was.

THE COURT: Overruled. Go ahead.

A. Anyway, it went off. He did not know at this time that anybody was around so he figured he would get what he could right quick and get out, and that's when Shinn first--in the meantime, the two Shinns had heard it down at the senior Shinn's home, had come up there, and senior Mr. Shinn was outside the vehicle, and the son started around. He told me--this tied in with what was in the evidence at the probable cause hearing--Mr. Shinn testified that he saw his son just as he got around the edge of the house there stick his hands up, and that he never saw David at that time, but as he went on around the house, David held a gun on him, said, "Come on in." David got him downstairs and then--

MR. HARKINS: Objection.

THE COURT: Overruled.

Q. This is what the defendant told you?

A. Yes, sir.

MR. HARKINS: To avoid being disruptive, could I have a continuing objection and motion to strike to this line of questions?

THE COURT: You have those. Your objection and motion

to strike--your objection is overruled and motion to strike is denied. They are to continue throughout this witness's testimony as to conversations, any conversation that transpired between the witness and the defendant. All right. Go ahead.

A. In any event, he had him standing there. He knew, according to what he told me, he knew if he knocked him out or tied him up, he could be identified. He just couldn't stand the thoughts of being identified and serve 20 years in prison. Shinn asked him not to shoot him. He said that--

Q. Excuse me. Is this Wayne Shinn?

A. Wayne.

Q. Wayne asked him not to shoot him?

A. Asked him not to shoot him. That he had no feelings about shooting him. He could have shot him in the face, shot him in the back. He decided to shoot him in the back of the head, and he shot him. He fell right where he was, and he said, if I recall correctly, ht thought he moaned or something of that nature. He started out around, and then it dawned on him that somebody else was there. He started around out from underneath downstairs, around by the patio and the drive there on the right there, and he saw the senior Mr. Shinn, and he was surprised to see him, and said that the old man started running, and he knew he had to run him down, and he ran him down. He said that he jumped in the truck and started out backwards, and he was panicked to death, and that he ran into a

sort of ditch or little culvert, low place there, and the truck stopped or stalled. In any event, he jerked the door open. What the State's evidence never did show but what David acknowledged was that Mr. Shinn kicked several times and kicked the gun out of David's hand. Shinn never testified to that. But David picked up the gun and then got back on him, said he thought he was going to have to manhandle, fight him. He got the gun back. I don't think Mr. Shinn knew David lost control of the gun for that short period of time, a second or two. In any event, brought him back out, told him to start walking around the house. Mr. Shinn asked, "Please don't shoot me. Whatever you do, don't shoot me." A car passed by at that time. They live in the country, and a car passed by at that time, and he held the gun down so it couldn't be seen, and kept on walking Mr. Shinn up there and just never let him know what was coming. He raised the gun and shot him in the back of the head, and the old man fell quickly--and I'm using his terminology that he referred to Mr. Shinn as. That he got out of there, got his car, got out of there, and in the course of this unexpected event and excitement, he forgot the crowbar. That he went over and got Phyllis to come back with him because he didn't want his car back over there in that area. He threw the gun in Lake Concord going over there, then came back, got the tire tool. That he told--over a period of time, he told Phyllis the whole story from A to Z. They went on to Salisbury

that day and saw a couple of different people, shopping, that kind of thing. That he felt real safe about it because he knew no one could identify him, and that when the news got out, both in the paper and on the radio, that Mr. Shinn had lived, he did not believe it. He couldn't believe it, because he knew that he shot both men in the back of the head, and he just could not fathom the fact that the man had lived. And he indicated to me--I think he stated to me, "It took me a day or two to believe that." Then he still felt pretty secure about that because he figured that Mr. Shinn was so excited and possibly there might have been some kind of emotional reaction or shock reaction, and he probably couldn't identify him. He felt safe, extremely safe, about Phyllis knowing. That's the last person in the world he thought would ever give him any problems. Then we went into the relationship that he and Phyllis had had over a period of time. Apparently it was a relationship that was a friendship, companionship, but not lovers per se. He said he lived there. She cooked the meals, washed his clothes. He would go out in the evenings wherever he wanted to go, do whatever he wanted to do, and she would do likewise. He knew she was a prostitute, came from a very religious family, her mother particularly; felt they, or she, would not want her children--the community and her people to know she was a prostitute. That would be itself one of the great deterrents in having her say anything. He never expressed a

feeling of what you would call someone in love with someone. He certainly expressed a great deal of concern and interest and closeness to her. He thought a lot of the children involved. He looked after her. He described how he would participate in things around the house, sort of help in the housekeeping chores, clean up, cook occasionally, do some things like that. Apparently they lived in a relationship based on a mutual kind of understanding and agreement. Sometimes he even loaned her money if she was a little bit short and he picked up some money, and she would pay him back. And vice-versa. He had total confidence she would never say one thing. He could not fathom that she would ever turn State's evidence on him. Even after his conviction and the letters he wrote me, that was the one thing he just couldn't accept. That was the personal relationship between him and her, I assume. In any event, he told me about Lisa Green. He told me how that this was sort of his girlfriend and that she had a child, if I recall, and she stayed with another man. He still saw her and she sort of had an arrangement that he had discussed it with her and that she was willing to give him an alibi. That she would lie for his benefit. The fact she wrote to Mr.--to the Kannapolis paper saying he was with her, various and sundry things. He acknowledged she had some real problems. That she might be subject to effects of alcohol or something else, and she was not stable emotionally, but he felt she could stay

in there with him. There were some letters back and forth between them, but that her alibi was a flat lie. Wasn't any semblance of truth in it. The process was he had been with her the day of -- and, of course, he was with Phyllis the day of, was seen by different people at different localities up in the Kannapolis area, and David's feeling was that people wouldn't be that sure. Was it that day or the day of the killing? The day of or the day after? If she said it was the day of, that was it. One of his strategies was if the police officers wanted to talk or the solicitor, to go down there and see them. Be cool, confident. Don't bring anyone. Don't panic. Be cool. Go up there and say, "What do you know?" Say, "I don't know nothing about it." It was sort of a reverse psychology. David is a very smart man. And he's keenly aware of how to manipulate. The man is one of the greatest con men that ever lived.

MR. HARKINS: Object to that characterization.

THE COURT: Sustained.

MR. HARKINS: Move to strike.

THE COURT: Strike that from the record.

A. He figured just what he would do to help fend off anybody pointing a finger at him. In any event, we went through this procedure. I'm just talking about his criminal activity in relation to this act, though there were other things discussed. From that point on, I knew that what I had to do was set up

a defense perimeter, I wasn't going to be on the defensive with evidence. I was going to try to hold the line, punch dots in the State's case wherever I could and try to discredit any witnesses the State offered. As a result of that--we discussed this--I couldn't put him on the stand. I told him what the consequences of going on the stand were, because he had either one of two choices: he either had to admit he did it or lie. And he wanted to use Lisa Green. I told him right upfront, "I won't put up perjured testimony. I'm not going to do it. I don't think I have to. I don't care what they find. I will never do it in this case--I'm not going to do it." And I told him that. He kept coming back, "Well, use Lisa. Get these other people. Don't know whether it was this day or that day." I ruled that out at the top. The only thing we had left to do is if he took the stand, he would have to commit perjury, and I wasn't going to be part of that. The best thing to do was hold a defensive line and try to punch holes in it. I felt like the jury wouldn't believe Phyllis because of her activities as a prostitute. That Mr. Shinn would probably not be believed because of the panic and all that kind of stuff. In any event, from the early stages after that, after those initial interviews on this case, I knew I had to strike a defensive posture, and so I prepared my case in that eventuality way down the line.

Q. And you informed your client of that?

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right down the line. Didn't give me much room to improve.

Q. Obviously, realizing that you had to adopt that posture, you eliminated Lisa Green as a possible witness?

A. Absolutely, because I explained to him, I said, "David, you put her up and she's emotionally unstable to start with. You've already told me she'll lie." You see, the thing about it is to get him to understand what you've got to look out for from a trial strategy. Sometimes putting up evidence, you get 10 percent of good and 90 percent of hell, and the reason is you've got to anticipate what the State is going to cross-examine on. If you put up a witness that can give you 10 percent of what might be favorable to you, you've still got to look beyond that point and get to what the State can do when they come back. They were just hoping, I know, that I would call her. That would lay open lies, show "He put her up to it." Perjury, man, that's the only thing that could be worse. I had enough problems as it was. That's the point I took it from.

Q. Did you at that time discuss your decisions with your client, talk to him about how 52A-2000 worked, the bifurcated nature of the trial?

A. Went into that on several occasions and told him when we got in here, here's the way we'd work this. Frank and I set it up. I would go down and talk to David. One one day Frank would go, and the next day we might skip and shift around a

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a little bit. Then Frank and I would come back and compare what we were receiving on various things, and I felt like he was more detailed with Frank as to the very nitty-gritty of the crime itself, but he was more open with me as to the philosophical approach to the handling of this trial. We went into this bifurcated thing, and he clearly demonstrated to me through the process I discussed this morning about his ability, that this is what he wanted to do, even though it was the kind of thing that in doing, could tie my hands on what I could do on the sentencing stage of the trial.

Q. He talked to you repeatedly about the fact that he wanted to die if he were found guilty; his bottom line to you was, "Get me found not guilty or get me death, one or the other," and you talked to him about that on many occasions?

A. We discussed it at some great length. We discussed in in these aspects, as I recall. We discussed it on a philosophical basis and discussed it on a legal basis and discussed it on a strategy basis, where that put me in trying to defend him. I brought out in one of our conversations the fact that the Supreme Court was in this posture of reviewing all death sentence cases to make sure they were equal and not prejudicial to race and some of the other factors that were involved, and that at this point, no one had been put to death. Barfield was still alive, others, and I told him repeatedly, "I am opposed to the death penalty," and I still am today. I believe

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that if man gets life, that should be life, but I don't believe in taking anybody's life. That's just my personal belief. In any event, I told him about that fact, and then he says, "I want to be put to death. I don't want to sit around and wait for them to make a decision." I said--well, part of the process was feeling him out to make sure he wasn't playing me like he did others, and that he clearly understood this. So I was on track to see, and he would repeatedly come back with sound judgments, that's what he was telling me, and telling me why he wanted it. I told him, I said, "Well, you put me in one hell of a position." I said, "I'm trying to save your life and you're trying to take your life." He said, "I don't want to sit down there and wait forever for them to make up their mind." I don't know. There's an old writ called Macdamus, Mandamus, whatever. Anyway, why you can fail to get a public official to perform his duties. And I said, you know, we could file one and maybe get somebody to get them to put you to death, go that route. He said, "You realize what they would put me in? If I chose to do that, I'm down there years and years, and they're not going to put me to death, but I'm sentenced to death." In other words, if they're going to do it, do it. If they're not going to do, don't do it. Is that what you want me to convey, that's what you want me to try to accomplish for you? Then we we went through this process again--I don't know how many times--about the quality

of life. That he did not want to live in that situation. That he would not live in that situation. That's what I mentioned earlier this morning. When the lady that was a paralegal or whatever, we discussed all that. We talked about whether it was a legal point of view, philosophical point of view, trial strategy point of view. We discussed this on many occasions.

Q You discussed mitigating evidence with him, did you not?

A. I indicated to him by him taking the stand and saying, "I want to be put to death," that literally took away from me the most mitigating circumstance in all this, and that's a man wanting to save his own life. It's pretty difficult when you're trying to convince that jury, the evidence we discussed, the possibilities we had going through this process, the mitigating evidence--what can I put up as mitigating evidence? And I talked to all these people, and the only kind of thing they wanted to give me was he was a pretty good guy. Violating the law--he was tough, he could handle his own--lived with a prostitute--those things. I thought about, well, even though he hadn't seen his mother and father in all these years, what do you do? Get her down here? I went through that same process of a little bit of good and whole lot of bad. You put up his mother: I love him. I hate this has happened. I don't believe he could do it. Whatever she might say. He was a good boy. Came up, worked hard. His daddy left.

Whatever it might be. Then cross-examination: How long has it been? I haven't seen him in five years. Did he ever write you? No. Ever send a Mother's Day card? No. Ever send you anything for Christmas? No. You see, you've got to anticipate when you put up evidence, what you're going to reap by that evidence, and I made--you know, we got into the trial the fact that he had been a good worker, by implication, up at the Kmart, looked after kids, Phyllis Soden. That he had a minimum of crimes. Some of this came out on the examination at that stage.

Q. In fact, you did bring out through his evidence when he was in the sentencing stage that he had lived apart from his parents a number of years but that he had cooperated with law enforcement; that he had not much of a record, didn't you?

A. That's true. I didn't want to bring those officers down from Stanly County because they had a lot of feelings for David that weren't completely complimentary. I knew here again, what you reap on cross-examination. You've got to balance that. It's critical, a critical decision. Of course, sitting here today with hindsight 20/20, there are plenty of people to say you should or should not have done that. I'm as convinced today as I was then that I gave him his best shot in handling it that way because of what I knew.

Q. Now, when the defendant testified that he wanted death, he did that only over your objections?

A. We discussed that was what he wanted to do. That's the reason I had him questioned by the trial judge outside the presence of the jury. I wanted something in there to indicate how long this had been oncoming. At this portion of the trial, Frank became extremely upset. Frank talked to him about the religious aspect. "Don't do this." He was set in his mind. That is, Lawson was set in his mind to do this. And he instruct me to do it, and he instructed me that after the case was over with and after he was put to death, I should never tell anybody. He wanted the jury to suffer, always wonder whether or not they had made the right decision in this case. I went over these conversations with him time and time again. It was the same thing, over and over, and brought out things about--that David could not accept one thing. That Mr. Shinn did not die. He just couldn't get away from that. I doubt if he could deal with the realization that Phyllis could turn him in.

Q. Now, you took Phyllis Soden's statement which the State provided you, even though they did not have to?

A. Right.

Q. You gave that to Mr. Lawson, had him go over it, did you not?

A. Yes.

Q. You took him down each strategic decision, avenue, development in the case as it came to you, did you not?

A. There was really--it was a matter of a defense all the way.

Questions by Mr. Johnson; Answers by the Defendant:

Q You understand? I want to explain something to you, and then I'll type up something. Is it my understanding, after we've talked about this stuff, my understanding is that you wanted to do two things, if possible.

A Yes.

Q If we assume that you are found guilty, we don't know but we're saying if we got to that status and you realize this is a second trial--

A Yes, sir.

Q --same jury, second trial. As usual, I can ask for a verdict. The judge would give us anywhere from--he might postpone the second trial to the next day, say, "Or I'll tell you what. The jury has now returned the verdict. It's 11:00 o'clock. We'll be back at 3:00 this afternoon and have a second stage." But there will be some span of time, and then, "All right, call your next witness." Okay? At this point in the trial, the State will offer evidence which they call aggravating, and I gave you a copy of that.

A Yeah, I know, aggravating.

Q That is, was it a heinous type thing or was it committed with some hostility above normal, or this kind of thing. Well, you committed it in the course of a felony, breaking and entering. If they find you guilty--if they find you guilty of that, they're going to find--if they find you guilty

of the killing, they'll find you guilty of (two voices at once)--

A Yes.

Q Okay. That goes along with the package, but what I'm saying is they will put in those circumstances of past criminal record and how you deliberately and willfully did it, whatever.

A I'm not denying the fact that I deliberately did it.

Q Okay, but now, and you come along and you put up any mitigating circumstance, which is that you were emotionally upset or mentally wrong, whatever. We don't have any of those circumstances in this particular case. Or that you're a nice guy, all this kind of stuff. Okay, that's the second trial. And then the judge charges, "Ladies and Gentlemen, if you find that the aggravating circumstances--(unintelligible)--that the aggravating circumstances outweigh the mitigating circumstances, then you would be permitted to find--return a verdict of the death sentence. On the other hnad, if you don't find the aggravating circumstances outweigh the mitigating circumstances, then you would find that he should be sentenced to life." But that's--(unintelligible)--but anyway, that's basically what that little second trial is about. And as I understand, your position is, if that jury comes back on the first trial and says, "We find the defendant guilty of the murder and guilty of the assault with intent to kill and the robbery," the whole thing, which would max at about 180-some odd years--

A (Laughter)

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Q That is, if you were given a life-plus-plus on the sentence. Now, it's my understanding--we've talked about it--that what you want to do is say well, if you found me guilty of this, just sentence me to death.

A That's right.

Q Well, realize that that's an approach--

A It ain't never been done before.

Q Well, most people jump up--don't say it--but what I'm saying, what we would have to do would be probably prepare a very extensive legal document stating that you and I had discussed this matter on a number of occasions, six or eight times now.

A I'm never going to admit that I done it. As far as I'm concerned, they just don't have the evidence to know for sure. Well, I don't know if that's true or not, but they just don't, and you know--

Q You base that on the fact that there is no eyewitness, just people who say--

A This and that and the other. His description of me wasn't shit. Am I right or am I just lying to myself?

Q Well, it's enough to get by, obviously. In other words, he describes a man--he describes a man who fits your general characteristics with the beard, the height, the (unintelligible). The only difference is variation, and that very well may be just an excitable oversight on his part--he's not heavy about

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the glasses or the non-glasses. He just remembers the eyes, beard, and this kind of thing. But that's--that little discrepancy there may or may not punch a hole in the jury's mind as to, you know--

A He said I had black hair, black beard.

Q Well, here again, at a time like that, you go on impressions. It's like seeing something in a flash, you know--

A But the man seen me coming from 100 and some foot. You'll bring all this up, I know.

Q I know. What I'm saying is you keep arguing that they can't believe that. I'm telling you if they want to, they can believe that. That's where we're going.

A This is what I know. (Laughter)

Q Back to my point. Assuming all the arguments we make about the identification and this woman has just got a heart and, you know, she's a little unsavory character, woman of the streets, don't believe her. Assuming all that passes and argument is made and they do return that verdict, then the judge is, under law, bound to give a second trial. No man, to my knowledge, except maybe one recently got up and said, "Just let me take the long walk. I don't want to waive this." Well, the judge, in my opinion, would go ahead as required by law and give that trial.

A Yeah.

Q Then he'll go through that trial session, and that would be

the position to take. What I have spoke to you about before was trying to put the State in the position of implementing the death sentence. I think it's hypocrisy, frankly.

A. I know your feelings about it.

Q. If they're going to do it, do it, if they're not going to do away with it. What you want to do is try to make your case somewhat a test on that.

A. Not really. I want it done, but I don't, you know--

Q. It would be testing them in the sense that you're saying, "Look, you found me guilty. That's it. Let's get the sentence over, and I want the death sentence. Don't send me down there on Death Row and keep me there the rest of my life."

A. That's not really what I want to say, Jim.

Q. All right.

A. I want to say, you know, you've got to look at the quality of a man's life. Man, that prison system, you just ain't got a whole lot to look forward to day after day. Let's be honest about this thing. You know what I'm saying? You always have the urge, always have the pressure on you. I mean you just don't have nothing to look forward to one day or the next, never, ever, and the quality of your life just ain't worth living if you ask me. You ain't doing nothing but just taking up space in that thing. You're doing no human no good whatsoever, none, absolutely. Just as well kill the man, save the taxpayer some money, and I've thought about this thing for five months. I

know exactly what I'm saying, exactly. That's it, the way I feel about it, completely, Jim. I mean if you--life ain't worth living in there for me. That's the reason the thing was done to start with. If he can die, I can die, too, to preserve my freedom. Do you know what I'm saying?

Q. Uh-huh.

A. I'm not scared of that chair. When I get in the thing, I intend to tell them all I'm still not guilty. I'm doing my right, whatever it takes.

Q. Would you be willing to tell that to the jury?

A. Yes, sir. That would be--the quality would do nothing for me, nothing to look forward to, one way or the next, really. The nerves, the pressure, being right with a bunch of logger-heads the rest of your life. Just ain't my idea--gee, we save taxpayers money, too. That's the way I feel about it.

Q. Well, I can understand with no chance of parole.

A. One hundred and eighty years? I doubt if I outlive it.

(Laughter)

Q. But that is the route you want to take? You're sure of it?

A. Yes, sir. Yes, sir. Entirely. My feeling is they ain't never going to know for sure. You ain't never going to tell them, and you know, after I'm dead and gone, I don't want you to tell them. I want them people to be thinking about it. They found me guilty of this bullshit, as far as I'm concerned. And you do know what I want? You're doing me a

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favor. You're getting me out--I'm out of the prison system, one way or the other, that way. I told you how I feel about death.

Q You're still firmly convinced you were here before and will be here again?

A I believe it.

Q When you were here before, when, where, how?

A (Laughter) Don't ask me. I'm probably the same kind of man this time I was the last time.

Q You said one time--or maybe it was me--but I was somewhere thinking about this the other day--I think about your case, what I want to do.

A I know you do.

Q I was thinking you said something about the fact you knew that you could have or you did ride with Jesse James or something. There was something--

A Uh-huh, yeah. I always--I mean I've always felt like that. I've always had that larceny in the blood or whatever you want to call it, you know. I'm not the all-around-the-world guy right now. I work hard for my living. Only reason I steal is I can't make enough money. Didn't have enough sense to stay in school down there and get my college degree and everything like I could have. And I go out and do these things to make my money to buy the things I want, and you know, I'd do it again if I had to.

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Q You'd kill again if you had to?

A Yes, sir. In a heartbeat.

Q You feel like that? This experience wouldn't--

A No. If you let me out today and somebody threatened me, I'd do what I had to in the same situation. I would. But I wouldn't tell nobody. (Laughter) Don't tell nobody. I'm sorry, Jim, but I know what I'd do. That's a fact. I have no remorse about killing the man. I've thought it over, laid in that bed and thought about it and thought about it, you know--you killed a man, you know--didn't have no damn choice though. I mean, you know, I hate the old man didn't die, Jim. (Tape skips at this point.) Hard son of a bitch, but if he had died, we wouldn't have no case.

Q True.

A I meant to kill him. And I thought that one bullet would do it, but the man was harder to kill than you'd think. Next time it won't be just one. Probably empty the whole cylinder out. I like to think that if you get me out of this, I guess you know a lawsuit's going to follow. I like to think I'll get enough money out of that lawsuit to go back to school.

Q What kind of lawsuit? You haven't got anybody you could sue except you could sue her.

A You could sue the State.

Q You could sue her but you couldn't sue anybody else.

A Couldn't sue him?

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Q Huh-uh.

A Why?

Q There's an Immunity Act that a victim who testifies is protected just like a law enforcement officer. If he arrests you and it turns out to be a bad arrest, you can't turn around and sue him. If you didn't have that protection, every law enforcement officer and every victim would be afraid to testify. (Unintelligible) So there's a statute that protects them from being sued back, but not other individuals.

Q I couldn't sue the State for blasting my name through the papers and all that mess?

A No, because you've been vindicated. See, the State would never be able to act if it was subject to that. This goes back to the old commonlaw of England. The king can do no wrong. He might make a mistake, but he can do no wrong. It's an immunity toward the government.

A I'll be damned. I didn't know that. I thought I could sue the State for putting me through this damn thing.

Q If you could, the Court would be full of this kind of stuff.

A Putting me in fear of my life, all this and that.

Q Obviously, you would have the right to file a suit, and get about as far as the front door, and as far as the gal goes, what the heck--

A She ain't got nothing.

Q That would be a losing cause.

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Q In any event, you know, there's no monetary gain to be-- you know, it's just like this girl I got off on this murder over here, her husband, you know, she's destitute, little kids, and she can't turn around and sue them because she was tried and kept in jail, all this kind of stuff, this kind of thing. I think that, you know, there might be some justification for some legislation in the future which would allow an individua who has been found not guilty or who--I think the only case is where a person has been found guilty and sentenced to prison and actually served time, and then the true person comes up and says, "Hey, I did it."

A But it cost me my job. I haven't been able to make no money back there in jail.

Q But you see, what it comes back to is you put yourself in that position. You voluntarily put yourself in that position.

A What do you mean?

Q By getting caught.

A I voluntarily--I didn't voluntarily get caught. (Laughter)

A Well, as the old saying goes, if you can't do the time, don't do the crime.

A (Laughter)

Q That's where you come from. Well, in other words, if we get to that stage in the trial, that that is the position that the trial is in with a conviction, then what you're saying is that you authorize me, (1) to waive the second trial and ask for

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the death penalty on your behalf.

A. That's right.

Q. And obviosuly, what I would do is prepare a legal document of some length stating that we had discussed this, the ramifications of it, and that you had authorized me to waive the second trial and ask for the death penalty. I think the judge would overrule my request for that but go ahead with the second trial. The State would put up its evidence, and then I would simply put you on the stand and say your bit. You see what I'm talking about? As a result of that, that would put us in the position of the State, assuming the jury acted on the request--you must realize there might be a reverse psychology here. The jury seeing a man simply trying to destroy himself, they may react that way, thinking well, we have a responsibility to save him. See what I'm talking about? You know, maybe he can be redeemed, maybe it won't be this bad. You know, human nature being what it is--because when you get back in the jury room and you're deciding a question of life or death, that's a whole separate ballgame, you know? No one wants to vote to kill somebody. They don't want that on their conscience. Now, you might relieve that burden from them, saying, "Go ahead and do it, because that's what I'm asking you to do," but still they've got to wrestle with the proposition that they have to live the rest of their life with the fact you couldn't have been put to death unless they in a sense okayed it by coming back

D-95

in and recommending it. Now, the judge has nothing to do with this because if they come back and say, "Life," he's got to give you life, even if he wanted to shoot you himself.

A. (Laughter)

Q. See what I'm talking about?

A. Yeah.

Q. On the other hand, if they come back and say, "Death," he's got to give you the death sentence, even though he personally is opposed to the death sentence. I don't know how Judge Davis feels about it now. Jim and I were law partners for many years, and I know that he has in the past been very adamantly opposed to the death sentence, but, you know, he wouldn't have any choice. He's got to do whatever the jury says. That's the crux of that question. But what I was getting to that we had discussed before, every person who has been sentenced to death in North Carolina since this new act was passed in the mid-'70s, no one has had the execution carried out because there's a provision in the statute that simply says the Supreme Court will review the implementation of the death sentence to see that it's not being capriciously or arbitrarily applied. What they're driving at is this. We want to make sure we're not killing more blacks than whites or whatever. Right now the population of Death Row is about on the basis of the population generally. There's as many blacks down there as there are generally in the general population. There are many whites on Death Row down there, and

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there are some women down there. So it transcends both sex, age and race, and based on that, what I was thinking about doing if you want to proceed in that fashion; was then to see if I can file a Writ of Mandamus to force them to do that, because on the theory that if you've got a death penalty, make it work. If you haven't, just say we have it on the books but it doesn't work so we're doing away with it. I'm prepared to file a Writ against the governor of North Carolina to say, "Okay, this guy wants it. Do it." And if he comes back and says, "Well, the point there is they haven't decided," that's not the questic He doesn't care whether the Supreme Court waits another five or ten years to decide this question. He knows he has been voted the right to be put to death, and it's your responsibilit to carry that out. If you don't, you've violated his constitutional right because, you know, this is an entirely different question down the road, but it has to be sort of raised now to do it, but the unique position you're putting me in as a defens lawyer is totally out of characteristic of what I generally try to do, and that is, to save the guy's fanny, and you're saying, look, if we get to that point, don't do that.

A. No, don't save my fanny, Jim. You're not doing me no favor if you do that, by leaving me in prison, really you're not.

Q. I understand where you're coming from.

A. I mean, you know, I hope you do. I hope you understand entirely.

D-47

Q. I do. I think if I was in your position and that was the only alternative--

A. And I'm getting out. (Laughter)

Q. You are getting out. And say--looks like a parole--

A. (Laughter) Haven't seen many paroles like that, huh?

Q. No, but there are not too many people that want to take that parole, that method of parole.

A. You know, they've got that other big boy back there they've already charged in first-degree murder. He's already wanting-- (Laughter) You ought to see that sucker, boy. He would make three of me. He's huge.

Q. I've heard he's a big man.

A. A very big man.

Q. Okay. Well, being we've got that down, I'm going to hold on that and then we'll see.

A. Like, you know, that Karen Ann Quinlan thing?

Q. Yes. You know about that.

A. I agree with them people 100 percent. If she can lay there and live without all that, all them monitors and stuff, you know, but if her brain's dead, you know, she ain't nothing. She ain't doing nobody no good. She ought to be dead. I would want to be dead. I'm sure you would.

Q. Right.

A. There's just no quality, no sense in living. There's nothing there. Nothing. The same way with being in prison.

D-48

You ain't got nothing to look forward to one day or the next. Fighting off a bunch of loggerheads every five minutes, having to put up with them people, it's just not--just not having the things that make life worth living to me.

Q. Have you served time in prison before? You did, didn't you? You served a sentence in Stanly County?

A. Yes, sir. Entirely different prison.

Q. Sort of like a trusty?

A. Yeah, that wasn't--that was like a--

(Both speaking at once, laughter)

A. I about done the same thing, you know, but I think I got a pretty good idea of what prison would be like. I don't know how my nerves would affect me just being around a bunch of people like these back here, you know. I wanted to flush several of them down the toilet. But I know when my trial comes up, that wouldn't look too good. But what has a man got to live for? What can you look forward to? Getting out in 30 years, old man? I'm in the prime of my life. I mean I talked to some people about it. They say, "Well, you know, don't ever give up." Thirty years? I know people that have a family and got what they wanted when they got out after they spent all this time, you know, but I just don't think I would want to. I just can't handle the idea of spending so much time in the place like that. I mean I might do the same thing. I might commit suicide. I don't want to do it, but I would (unintelligible). You know

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what I mean?

Q. Let me ask you this. What--did you ever think back to what this came out--what did you want to accomplish in life? or where did you want to go? Did you ever have any particular plan or--

A. What did I want to accomplish? I'm a split personality, Jim. There's two people. There's two pieces to me. Part of me wants what the other man wants, a family, work, you know, come home, this and that. Then there's a part of me that wants to have some sort of power or something, you know, like plenty of money, flash that money around, be somebody, be a big man, have anything you want, any woman you want, go where you want whenever you want, whatever you want, not having to work. You know what I'm trying to say? Just live life easy. If I want to take me a cruise to the Bahamas, go take me a cruise, you know? And I will not be broke. I will not. I will not put up with being broke. I work Monday through Friday and if I got $100 in my pocket, I am happy. If less than that, I'm looking for somebody to rob, some way to make that quick. That's really my downfall. I get a little bit of money in my pocket, get into gambling--and you can't win gambling, nobody can, no human can. Go out, get broke, and next thing you know, I'll be out robbing somebody.

Q. You said that you had a rough time coming up when you were a kid?

D-50

A Well, yes.

Q You don't contact any of your people now and they don't contact you?

A I don't mess with my people at all. I called my mother because the Concord Tribune called her, told her they run the Tribune and they told her I was down here for first-degree murder ald all that. I called her up and told her I was innocent and not to worry about nothing. They didn't have no case on me and everything. And I thought that was a dirty thing to do. They didn't have no cause to call her, none of her business. If I had my way, she would have never knowed it. I just went on here last five or six years, just had no contact at all with her. She's nervous about it and tore up about it, told me to call her and let her know what happened, you know. I can't relate to my people at all. They just don't understand me. When I was young, I dropped out of school the beginning of the tenth grade, and I done exactly what the paper said. I run with a big gang down there. They call us the Purple Gang. There's six or seven of us boys, called us the Purple Gang after mobsters that used to live down there, Purple guy, used to run with Capone. We pretty much ran the town. We went around rolling gunks and stealing and everything under the sun, and we were good at it, and we got away with it, and we got away with it all the time. They surrounded us one night down there. They had a big college down there, Central Michigan

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University, and we were hitting them dormitories. I don't know if it was Easter weekend or Thanksgiving weekened. I can't remember. But one of them weekends when the whole college was away. We were hitting all them little apartments down there. Looked out the window and the whole damn place was surrounded by them. Matter of fact, they caught us. They were watching.

Q What did they do to you then?

A I spent five months in the boys' home, boys' camp. You know, when I look back at it, that was probably as good a time as I ever had when I was a youngster, was when I was there. Hell, I tried to run one time. Tickled me. My nerves, man, I just couldn't handle, you know, just being locked up all the time. People, they got to know me, and they let me do what I wanted to. Didn't have to go out. I worked around there with the maintenance man. When I wasn't working--had a lake there and they let me take a boat and go out there and fish all day long, do whatever I wanted to. Within a month, when I was leaving--when I first went there, actually on the first day you got to show you're a man, can't nobody mess with you. A big nigger down there, I was sitting there watching TV in the front. He was--he got up. The rule was when you got up, you lost your chair. So I went over and sat down, and he come over there and jumped me, and I went to his ass. They split us up. I got to talk to him the next day. He said, "Want to have it out? If not, forget it. Let it be.

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No hard feelings about it." "Fine." The man respected me about it after that. I went to run one day, and he was sick in there in the bed, and he seen me going. I got about three miles down the road, and he tackled me and told me he wouldn't let me run. I was going to get out in a month. Said, "You ain't running. You're going to stay here and get out." I never had anything happen. I never talked to the man much. Never really had no use for him. When I got ready to run, said, "No, you ain't gonna do it. Stay here. Do this time. Get out and you ain't going to have nobody worrying about it."

Q Did you a favor?

A Done me a hell of a favor. First time I met him, we had a big fight down there. I can look back and see how my nerves were then. I know they'd be worse now, especially in the prison system the way it is, back here, being locked up, just nothing. Hell, I like my ladies as much as the next man. You know, I like my money. I like my freedom. Like to go where I want, do what I want. That's essentially the way I live.

Q Why would you jeopardize that by doing what you did?

A For money.

Q For money? The thrill?

A Ah man, that's a hell of a thrill. (Laughter) I had to shoot the man, Jim. I didn't have no choice. If I had let him live, tied him up, got up there and got his father and tied him up, I wouldn't have no chance in hell of beating it.

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Q You would have had the same thing. You could have shaved your beard, not been identified, you know.

A You reckon?

Q Obviously--

A They both seen that damn car. Anybody could pick that damn car out. The boy would probably remember it had a white top and all that, you know? Could have remembered the dents in the darn thing. He was a lot younger than the other man. The only reason the other man can't describe me or remember anything any better is because he was shot and he was scared to death. His eyes were that big around.

Q Wouldn't you have been?

A Huh?

Q Wouldn't you have been?

A Yes, sir. I don't know. No, I don't think I would have been as scared as he was. I think I could accept it. That man was scared, boy, and the reason I shot him in the back of the head wasn't because I couldn't look at him and shoot him. I figured it was the least cruel thing to do, kill him and get it over with. I said to myself before I shot the boy, I said, " well, what am I going to do with him? I said I guess I'll have to kill him, you know. I thought, should I turn him around and shoot him like a man or not let him know what's coming and just kill him right there? I said well, be easier on him not to let him know it's coming and whine to me and all this and that, you

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know, and so I shot him. After I shot him, whew, all sorts of shit started going through my mind. I mean I went to look out there and see if anybody else was there. I knew I had to kill him at the time. And I had him down there a moment getting ready to shoot him again, and thought what if there's somebody else out there? I went out there, and here's the old man running toward his truck, and I said, shit, and I took off like a rocket. Get up there and catch him. I got to thinking, wondering if somebody else heard that shot. I was running toward the old man. The old man kept going. I'd have probably shot at him a couple times but doubt if I could have hit him. But he stopped the truck. He was scared, and he crawled over there in the seat and just laid back here and kicked the gun out of my hand. I thought I'd have to fight him, but I picked up the gun and turned around to the truck. "Yes, sir, yes, sir, don't shoot me. Please don't shoot me." I hid the gun and pretended like I was walking up the hill. I said, "Move. Get up that damn hill." I said, "Move." He started whining, "Please don't shoot me, whatever you do, don't shoot me," you know. We got up there in front of the house, and I said, I have to get out of here.' This car done went by. Guns, the gun's done went off one time. I have to shoot this one. I've done went this far. I mean if the man dies and this one's living all this and that, you know. So I shot him, and I shot him point blank in the back of the head. Now, right back there--

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(Tape recording stops)

MR. JOHNSON: Now, the tape drags right here, but it picks up. Okay.

(Tape resumes playing)

A. Said get my ass out of a crack, and they weren't nobody to identify me. See, Jim, when you do that sort of thing, if I did that or anything else, if you're going to go there and do it, if you're going to carry the damn gun, by God, if you have to use it, use it. Know what I'm saying? I mean how many times I've had that gun pointed at me, and I thought-- and I feel no remorse today except for the fact that I didn't kill the old man. Man, I feel remorse that I didn't go back downstairs and shoot the boy again. I probably could have saved him a lot of pain. That's the whole idea of killing him instantly like that. There was no way to determine--when it come out in the paper that they were still alive, I still didn't believe it. Just like the woman said, I didn't believe it. I did not believe it. No way they could take a shot like that.

Q. No way or not, they did.

A. (Laughter) That's a fact, son. That's a fact. But I was real nervous after this happened. The law, the pressure, you know. I didn't feel no conscience about killing the boy. I had conscience about getting caught. I thought about running,

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you know. Said, naw, that's not the thing to do. Just stay here and be cool. Take your shit as it comes. If they do get you, the old man won't be able to identify you--(unintelligible)--wasn't worried about the woman. Wasn't even worried about her, not at all. That's the big shot. She had no reason in the world to turn me in except for reward.

Q She turned you in. She didn't know about the reward. She didn't qualify for it. She does now, obviously.

A She did know it. She read it in the paper. She pointed out that $5,000 that the State added to the reward, and when it come out in the paper, I come over and showed it to her. She pointed that out to me. We talked about the $10,000. The thing was she told me--

(Interruption of colloquy by Mr. Johnson and the defendant by a door opening and inquiry made about time.)

A Oh, about a week before she turned me in, I went over there. During this whole time, I did all the work. I'd stop by there, and she had me there, wasn't living with her, screwing her or nothing, just good friends, and I stopped by there and she treated me like number one, you know, and just a little while before this happened, she told me, she said, "Wild man, I know if you ever get caught," she says, "you'll get off of this stuff, this shit," you know, and I got to thinking right there, what the hell is she coming up with this crazy shit for? She just come out of nowhere. And I told her Lisa and I weren't

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getting along too good, and I was living over here in Concord, and I told her I probably would want to spend the night there rather than have to drive back, you know, stay in town and see if I could line me up a lick or something. I was low on money. She generally always left the door unlocked when she'd take off to Charlotte to go to work, you know, and I come back that night, and the door wasn't unlocked. That's the first time she ever done that. I should have known something. I should have known something.

Q Well, that's the amazing thing, you know, how turns of events come about, what you figure on, what you do, and what you don't do.

A Foolish thing. I know it was. Very foolish. Could very well cost me my life.

Q Yeah, could very well cost you your life.

A Well, in your opinion, is the case that strong?

Q Yes, the case is that strong. Here again, it's direct and circumstantial evidence. And it's the quality of the evidence--

A That we're questioning?

Q Yes, not the evidence, the quality, because they have--like I said, Frank will cover this with you tomorrow and I'll cover it with you Wednesday--but they have evidence that substantiates what she says and says that someone else saw the car go by and recognized it shortly after this occurred, or something to that effect. And they don't know where you've

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been, where you're going, but it backs up her story that "This is where we went and this is where we were going right after I picked him up." You see what I'm talking about? That doesn't mean anything except these are little tidbits of information that support where she said you all drove and where you all went. You see? These people don't know nothing about nothing. They simply saw y'all together at a certain time of day, which corresponds closely to the time of day that this occurred, which sort of supports her statement of what happened, which, of course, you know--

A. I did. (Laughter)

Q. All right. You're satisfied with the way we're going about the jury then?

A. Yeah, you're doing the best you can. I don't have much chance.

(End of Tape Recording)

THE COURT: That's all of it?

THE WITNESS: That's all of that tape, Your Honor, yes, sir.

THE COURT: Are there more tapes?

APPENDIX E

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THE COURT: Sheriff, bring in the jury.

(Jury enters courtroom)

THE COURT: Members of the jury, having found the Defendant, David Lawson, guilty of murder in the first degree, it is now your duty to recommend to the Court whether the Defendant should be sentenced to death or life imprisonment. Your recommendation will be binding upon this Court. If you unanimously recommend that the Defendant should be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a life of imprisonment in the state prison for life. All of the evidence relevant to the recommendation has been presented. There is no requirement to re-submit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the cases is competent for your consideration in recommending punishment. It is now your duty to decide from all the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or you might like it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence

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recommendation determined in the same manner and have the same law applied to him. You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believ all or part or none of what a witness has said on the stand. In determining whether or not to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, to knor or to remember the facts or occurrences about which they testified, the manner and the appearance of the witness, any interest, bias or prejudice a witness may have. The apparent understanding and fairness of the witness, whether his testimony is reasonable and whether his testimony is consistent with other believable evidence in this case. You are the sole judges of the weight to be given to any of the witnesses. By this I mean that if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case. Members of the jury, I will not go over all of the evidence as I did in the guilt determination phase or -- in the guilt determination phase of the charge. However, it is my duty to recapitulate part of the evidence so that I might give you the applicable law that applies to the evidence. You recall that the State in this case offered evidence which tends

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to show that on or about eight A. M. on the fourth day of December, 1980, Nancy Shinn left for work taking her three-year-daughter to the babysitter, that about eight-fifteen on that morning, Buren Wayne Shinn went to the Buren J. Shinn house in the company truck, that thereafter they heard a burglar alarm at the home of Buren Wayne Shinn. As they drove to that spot and after they had gone to that spot, Buren Wayne Shinn got out of the auto -- truck and went into the house or went around the side of the house, I believe. As he crossed the one patio and started down to the lower patio, he threw his hands up into the air over his head, that he said something and that he then was seen by Buren J. Shinn thereafter. That the detectives, upon arriving at the house, found the deceased -- found Buren Wayne Shinn unconscious and with a bullet hole in the back of his head. That he was taken to the Cabarrus Memorial Hospital, and thereafter he was transferred to the Charlotte Memorial Hospital where he was at that time, according to the doctor, brain dead. The next day he expired. That, that the Defendant in this case on that occasion was the person who Buren J. Shinn saw come from the house after he heard gunshots and came to that place and took him out of the automobile or out of the truck around to the back of the house where he shot Buren J. Shinn in the back of the head, that the Defendant thereafter went to the home of Phyllis Soden or Soden and asked her to take him some place quickly. That she took him back to the home of

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Buren Wayne Shinn where he ran into the area of the home, that he came back and she had turned around, and she picked him up a he had in his hand a crowbar, and he later took some money out of the billfold and put it in a plastic baggie. The billfold was not the type he was accumstomed to carrying. That, when th officers arrived there, they found Wayne lying on the floor in den. The autopsy, as you recall, indicated that the bullet which killed Buren Wayne Shinn was a 32-caliber slug, that in the opinion of the expert, both of the slugs removed from the brain and also from Buren J. Shinn were 32-caliber long bullets, probable make was Remington and probable weapon that fired them was Harrington and Richards revolver. That the Defendant had a 32-Harrington and Richards revolver sometime around September,1980, and that he was seen in the vicinity of the Shinn residence on or prior to eight A. M. on December four, 1980; that the Defendant and Mrs. Soden went to Salisbury sometime that day, either going there or coming back, he informed Mrs. Soden that he had broken into that particular residence where she had taken him, that he was surprised by two men and that he shot both of them in the back of the head, killing both of them and that the reason he had done so was that he did not want to go back to prison. The Defendant further told her he had thrown the weapon in the Yadkin River; that upon returning from Salisbury, the Defendant had Mrs. Soden drive him past the Shinn residence where he saw a number

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of police or law enforcement officers at that time, that the officers discovered that the door leading into the house had been pried open, that jewelry and other valuables were in a pillowcase on the sofa and part of the house had been ransacked; that the Buren J. Shinn gave descriptions to the officers on December four, 1980, of the person he had seen on that occasion, that he gave them descriptions that later dates all of which were consistent with each other and that at a lineup on December thirty-first, 1980, the Defendant (sic) picked out this Defendant as being the person who shot him on December four, 1980, the person he saw at the residence of Wayne Shinn on that date. That's what some of the evidence tends to show. Members of the jury, what it does show is for you and you alone to say and determine. Now, in the punishment stage of this case, the Defendant has taken the stand. The evidence for the Defendant in this case tends to show that he is twenty-five years of age, that he lived in a trailer off Rock Hill Church Road and has a GED education. That he has lived in North Carolina for approximately seven years, and that he has been convicted of two cases of breaking or entering in Stanly County; that he requests that you impose the death penalty; that he is innocent of the crime, but that he makes this recommendation, that he went to Salisbury with Phyllis Soden on the date in question, that he was wearing a black cowboy hat on that particular date; that he did try sometime

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after December four, 1980, to purchase a pistol. That's what some of the evidence for the Defendant in this case tends to show. Members of the jury, what it does show is for you and you alone to say and determine. I charge that for you to recommend that for the Defendant to be sentenced to death, the State must prove three things, and prove these beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or convinces you of the following things: first, that one or more aggravating circumstance existed, second, that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty, and third, that the aggravating circumstances found by you outweigh any mitigating circumstances or circumstances found by you. If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the Defendant be sentenced to death. If you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the Defendant be sentenced to life imprisonment. When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled Issues and Recommendation as to Punishment. This form contains a written

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list of issues relating to aggravating and mitigating circumstances. I will now take up these four issues with you in greater detail one by one. It will enable you to follow me more easily, the bailiff will give you a copy of the form entitled Issues And Recommendation as to Punishment which you will take with you when you retire to deliberate. Do not read ahead on this form, refer to it as I instruct you on the law. Would you please hand one to each of the jurors and to the alternate jurors? I would ask that if you've had the opportunity to glance through it, that you not read ahead, but follow this paper writing as I go through it with you. When you go into the jury room, you will be handed another, which is exactly like the one you have there. The ones that you have are duplications of this one, but the duplications are so good they look like originals so I have written in pencil on this the word original and this is the one your foreman will fill out when you go to the jury room and make up your verdict. Issue one reads as follows: Do you unanimously find from the evidence and beyond a reasonable doubt one or more of the following aggravating circumstances existed at the time of the commission of this murder. Now, there are two possible aggravating circumstances listed on this form. You should consider each of them before you answer issue number one. The State must prove from the evidence and from a reasonable doubt the existence of any aggravating circumstance. Before

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you may find any aggravating circumstance, you must agree unanimously that it has been so proven. An aggravating circumstance is a fact or group of facts which tend to make a specific murder deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence of this case, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which might be applicable to this case. First, was this murder committed for the purpose of avoiding a lawful arrest. Now a murder is committed for such purposes if a Defendant's purpose at the time he kills by that killing to avoid the arrestof himself and that arrest would have been lawful. If you find from the evidence beyond a reasonable that David Lawson killed Buren Wayne Shinn and he said that he had to kill the victim so that Buren Wayne Shinn did not identify him because he did not want to go back to prison, and that it was, in fact, his purpose to avoid his arrest by killing Buren Wayne Shinn, and that such arrest would have been lawful, you would find this aggravating circumstance and would so indicte by having your foreman write yes in the space after this aggravating circumstance on the Issues and Recommendation form. If you do not so find or have a reasonable

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doubt as to one or more of these things, you would not find this aggravating circumstance and will so indicate by having your foreman write no in that space. The second issue in this -- under the first issue, the second question was this murder part of a course of conduct in which David Lawson engaged and did that course of conduct include the commission by the Defendant of other crimes of violence against another person or persons. A murder is part of such a course of conduct if it and the other crimes of violence were part of a pattern of same or similar action repeated over a repeated of time, however short which established that there existed in the mind of the Defendant, a plan scheme, system or design involving both the murder and those other crimes of violence. If you find from the evidence beyond a reasonable doubt in addition to killing Buren Wayne Shinn, David Lawson or on about December 4, 1980, assaulted Buren J. Shinn with a deadly weapon with intent to kill Buren J. Shinn, and inflicted serious injury on Buren J. Shinn within a minute or so after shooting the deceased, and that this other crime was included in the same course of conduct in which the killing of Buren Wayne Shinn was also a part, you would find this aggravating circumstance and so indicate by having your foreman write yes in the space after this aggravating circumstance on the Issues and Recommendation form. If you do not find or if you have a reasonable doubt as to one or more of these things, you would not find this

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aggravating circumstance, and would indicate by having your foreman write no in that space. If you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed and have so indicated by writing yes in the space after one or more of them on the Issues and Recommendation form, you would answer issue number one, yes. If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravated circumstances existed and if you have so indicated by writing no in the space after every one of them on that form, you would answer issue number one, no. If you answer issue number one, no, you would skip issues two, three and four and you must recommend that the Defendant be sentenced to life imprisonment. If you answer issue number one, yes, then you will consider issue number two. Members of the jury, issue number two reads do you unanimously find beyond a reasonsable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to cause the imposition of the death penalty. Substantial means having substance and weight, importance, signficiant or momentum. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt

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that such aggravating circumstances are sufficiently substantial to call for the death penalty. Before you may answer issue two yes, you must agree unanimously that they are. If you unanmously find beyond a reasonable doubt that any aggravating circumstance or circumstances found by you are sufficiently substantial to call for the death penalty, you would answer issue number two, yes. If you do not so find or if you have a reasonable doubt, you would answer issue number two, no. If you answer number two, no, you would then skip issues three and four and you must recommend that the Defendant be sentednced to life imprisonment. If you answer number two, yes, then you will consider issue number three. Issue three is, do you find one or more mitigating circumstances. Possible mitigating circumstances are listed on the form and you should consider each of them before answering issue three. Mitigating circumstance is a fact or group of facts that do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of the supreme punishment other -- than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering issue number three, it would be your duty to consider as a mitigating circumstance any of the circumstances of this murder that the Defendant contends is a basis for

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sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value. A Defendant has the burdern of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt, but simply satisfied you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that cirumstance. If not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considfered all the mitigating circumstances listed on the form and any others which you deem to have mitigating value. It is your duty to consider the following mitigating circumstances and any others which you find from the evidence. First, consider whether David Lawson has no significant history of prior criminal activities, significant means important or notable. Whether any history of any prior criminal activity is signfificant is for you to determine from all of the facts and circumstances which you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the Defendant's record. Rather, you should consider the nature and quality of the Defendant's history in determining whether

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it is significant. You will find this mitigating circumstance if you find that David Lawson has been convicted of two cases of breaking aand entering in Stanly County and this is not -- it is not a sigificant history of prior criminal activities. Second, you should consider whether David Lawson testified truthfully on behalf of the prosecution or another prosecution of a felony. A Defendant does so if he is called as a witness for the State at any stage of the prosecution of any felony and truthfully answers any questions asked by the prosecutor. The felony need not be connected with the murder for which you are recommending punishment. Breaking or entering is a felony. You would consider this mitigating circumstance or you would find this mitigating circumstance because there is no evidence to the contrary and the State stipulates that the Defendant, in fact, testified truthfully for the prosecutio in Stanly County at an earlier time. Third and finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value and any aspect of the Defendant's character or reputation or record or any of the circumstances of this murder which is the basis for a sentence less than death. If you find one or more of these mitigating circumstances from the evidence, you would answer issue number three, yes. The Court directs you that you shall issue issue number three, yes, because of the stipulation as to the fact that the Defendant, in fact,

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testify in the prosecution of a felony in Stanly County at an earlier time. You must now consider issue number four. Issue numer four is do you find unanimously beyond a reasonable doubt that the aggravating circumstance or circumstances found by you outweigg any mitigating circumstance or circumstances found by you. If you find from the evidence one or more mitigating circumstances, you must weigh the aggravatin circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumtance whbich you find, whether aggravating or mitigating. Your weighing should not consist of merely adding up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance and then weigh the aggravating circumstances against the mitigating circumstances so valued and finally determine whether the aggravating circumstances outweigh the mitigating circumstances. If you unanimously find beyond a reasonable doubt that the aggravating circumstances found by you outweigh the mitigating circumstances found by you, you would answer issue four, yes. If you do not so find or have a reasonable doubt as to whether they do, you would answer issue four, no. If you answer issue four, no, it would be your duty to recommend that the Defendant be sentenced to life imprisonment. If you answer issue four, yes, it would be your

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duty to recommend that the Defendant be sentenced to death. Now, members of the jury, you have heard the evidence, the arguments of counsel for the State and the Defendant. The Court has not summarized all of the evidence, but it is your duty to remember all of the evidence whether it has been called to your attention or not. If your recollection of the evidence differs from that of the Court or of the District Attorney or of the defense attorney, you are to rely solely upon your own recollection of the evidence in your deliberatio I have not reviewed the contentions of the State or of the Defendant. But, it is your duty not only to consider all of t evidence, but to consider all the arguments, the contentions, and positions urged by the State's attorneys and the Defendant's aattorneys in their speeches and any other contentions that arises from the evidence and to weigh them in the light of your common sense and to make your recommendation as to punishment. The law, as indeed it should, requires the presiding Judge to be impartial. You are not to draw any inference from any ruling I,have made or any inflection in my voice or any expression on my face or any question I may have asked the witness or anything else I may have said or done during this trial. That I have an opinion or may have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved

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disproved or as to what your recommendation ought to be. It is your exclusive province to find the true facts of this case and to make a recommendation reflecting the truth as you find it to be. When you are ready to make a recommendation, have your foreman write in your recommendation as directed on the issues and recommendation form. Any further requests for instructions by the State?

MR. BOWERS: No, Your Honor.

THE COURT: Any further request for instructions by the Defendant?

MR. JOHNSON: No, Your Honor.

THE COURT: Members of the jury, the bailiff will hand to you this paper writing which is exactly like the one you have before you that I have gone over with you that is written there in pencil, original. This is the form you will use in your deliberation and the one upon which you will put your answer or answers. When you go to the jury room, I suggest the first thing you do when you go there is select from among your number one to be your foreman and to lead you in your deliberations and to also be your spokesman for you when you return to open court. When you all agree on your recommendation and are ready to deliver it, have your foreman date and sign this form, notify the bailiff and you will be returned to open court to deliver your recommendation. The two alternate jurors may at this time -- the -- just a moment --

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the twelve of you, is there anyone of you who are sick or are unable to continue, of the original twelve? If not, the two alternate jurors may at this time step aside and have a seat right over here. Retire and say how you find.

(Jury retires -- 4:20 P.M.)

(Jury indicates decision -- 4:55 P.M.)

THE COURT:' Now, I have no idea what the verdict is going to be anymore than you do. If there is anyone in the courtroom who is unable to sit here without becoming too emotional or without making some kind of gestures or noise or things of this natur, when the jury verdict comes in, and you -- then you have the right to leave the courtroom at this time. So, I will not have a mockery made of my court. If you cannot contain yourself, you have a right to leave at this time. All right, sheriff, bring the jury in.

(Jury enters courtroom)

THE COURT: Mr. Riggs, are you the foreman?

MR. EARL EUGENE RIGGS: Yes, sir.

THE COURT: Would you stand, please. Mr. Riggs, has the jury agreed upon a verdict?

MR. EARL EUGNE RIGGS: Yes, sir.

THE COURT: Would you fold that verdict form and give it to the bailiff, please, and remain standing. Members of the jury, please stand.

(Jurors stand)

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APPENDIX F

STATE OF NORTH CAROLINA

CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

No. 80 CRS 18307

STATE OF NORTH CAROLINA)
)
Plaintiff)
)
vs.)
)
DAVID LAWSON)
)
Defendant.)

ISSUES AND RECOMMENDATION AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER yes

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES WRITE "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Was this murder committed for the purpose of avoiding a lawful arrest?

ANSWER yes

(2) Was this murder part of a course of conduct in which David Lawson engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons?

ANSWER yes

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER " RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES," PROCEED TO ISSUE TWO.

Issue Two:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER yes

IF YOU ANSWER ISSUE TWO, "NO," SKIP ISSUES THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER " RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE TWO "YES," PROCEED TO ISSUE THREE.

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES," IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

(1) David Lawson has no significant history of prior criminal activity.

(2) The defendant testified truthfully on behalf of the prosecution in another prosecution of a felony.

(3) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER ISSUE FOUR WHETHER YOU ANSWERED ISSUE THREE, "YES" OR "NO."

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances?

ANSWER yes

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, David Lawson be sentenced to death.

This 6 day of June, 1981.

Earl Riggs
Foreman of the Jury

Reply Brief unable to locate at time of filming

(6)

SUPREME COURT OF THE UNITED STATES

DAVID LAWSON, PETITIONER *v.* GARY DIXON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93–7657. Decided February 28, 1994

The petition for writ of certiorari is denied.

JUSTICE BLACKMUN, dissenting.

At the time of his trial, the record suggested that David Lawson suffered "significant psychopathology," anxiety, depression, hostility, and a likelihood of deficient impulse control. He generally lacked the ability to communicate with his attorney or to understand the nature and seriousness of the charges against him. He thought of suicide and once had attempted it. It is hardly surprising that he told his sentencing jury: "You think I done it, gas me." 3 F. 3d 743, 746 (CA4 1993). Lawson's counsel, taking his cues from Lawson, neither investigated nor presented any evidence of his client's mental problems, which might have established statutory and nonstatutory mitigation, see N.C. Gen. Stat. § 15A-2000(f)(2) (1988) ("[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance"); § 15A-2000(f)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired"), which, in turn, might have meant the difference between life and death.

Lawson asserts in this habeas petition that his attorney's failure to investigate or to offer mental health mitigation constituted ineffective assistance of counsel. See, *e.g.*, *Kenley* v. *Armontrout*, 937 F. 2d 1298, 1303–1308 (CA8), cert. denied, 502 U. S. ___ (1991);

Thompson v. *Wainwright*, 787 F. 2d 1447, 1451 (CA11 1986), cert. denied, 481 U. S. 1042 (1987). To prevail on an ineffectiveness claim, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). The Court of Appeals upheld the denial of a hearing or relief on this claim because Lawson had "failed to present clear and convincing evidence of positive and unequivocal facts which generate a substantial and legitimate doubt as to his mental capacity." 3 F. 3d, at 754.

In a related claim, Lawson argues that, regardless of his personal wishes, the Constitution's twin requirements of rationality and individualized determinations command that his jury be presented mitigating evidence. See *State* v. *Klokoc*, 589 So. 2d 219, 220 (Fla. 1991); *State* v. *Koedatich*, 112 N. J. 225, 548 A. 2d 939 (1988), cert. denied, 488 U. S. 1017 (1989); *Morrison* v. *State*, 258 Ga. 683, 687, 373 S. E. 2d 506, 509 (1988), cert. denied, 490 U. S. 1012 (1989). Finally, Lawson asserts that the instructions given his sentencing jury would lead a reasonable juror to understand that the jurors must reach unanimity on the existence of a mitigating factor before considering it, in violation of *Mills* v. *Maryland*, 486 U. S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). See *Kubat* v. *Thieret*, 867 F. 2d 351, 373 (CA7), cert. denied, 493 U. S. 874 (1989); *Brantley* v. *State*, 262 Ga. 786, 794, 427 S. E. 2d 758, 765 (1993); *Engberg* v. *Meyer*, 820 P. 2d 70, 93 (Wyo. 1991).

Without deciding the merits of these claims, I conclude that they cast considerable doubt on the reliability and constitutionality of Lawson's sentence of death. Accordingly, even if I did not adhere to the belief that the death penalty cannot be imposed fairly within the constraints of our Constitution, see *Callins* v. *Collins*, 510 U. S. ___, ___ (1994), I would grant Lawson's petition for certiorari to review these issues.